No. 11989.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES A. NOELL and AMELIA A. NOELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

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Statement of Case.

The case is here upon a joint appeal [Tr. 27][1] by defendants, husband and wife, from judgments of imprisonment and fine, entered in the District Court of the United States for the Southern District of California, Central Division [Tr. 22, 24] upon verdicts of "guilty" [Tr. 14, 15] under a 3-count indictment charging violations of 11 *U. S. C.* 52(b)(1)(2) [Tr. 2], to which pleas of not guilty were interposed after their motion to quash was denied [Tr. 8, 9], as were their motions for acquittal (*F. R.*

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[1] *Abbreviations: Transcript of Record* is herein cited as *Tr.; Reporter's Transcript* as *R. T. Italics* are the writer's unless *contra* noted.

Cr. P., Rules 29, 37(a-2) [Tr. 17], and for a new trial [Tr. 18, 20, 21].[2]

Defendants were charged with the concealing of $25,000.00 and a car and making false oaths. Twelve days were consumed in the trial, the transcription of whose proceedings consumed 1,325 pages, excluding exhibits, of which there were some 150, none of which were read to or by the jury, who returned their verdicts after one hour and 25 minutes' absence from the courtroom!

Each defendant was sentenced to 3 years' imprisonment under Count I. Sentence was suspended and 5 years' probation granted defendant James A. Noell, under Count III, upon condition that he pay a fine of $5,000.00 [Tr. 23]. A similar sentence and probationary term was imposed upon defendant Amelia E. Noell, under Counts I and II [Tr. 24].

The original exhibits are here by order of the trial court [Tr. 39] and this Court ordered that a typewritten record of the oral proceedings be, and a complete transcript thereof is, filed (*F. R. Cr. P.,* Rule 39(b); 28 *U. S. C.,* Sec. 1915(b)).

Appellants specify twenty grounds for reversal, some of which may be grouped and discussed together under appropriate caption headings, and one of which challenges the sufficiency of the evidence to support the several ver-

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[2]Motions for acquittal were exhaustively argued at the close of plaintiff's case in chief and after the verdicts [R. T. 934, 1274].

dicts. As the prejudicial aspects of other errors cannot be otherwise fully appraised (*F. R. Cr. P.*, Rule 52(a)), a complete statement of facts will be presented in the argument of the insufficiency of the evidence.

Jurisdiction.

Count I of the indictment, returned by a grand jury in the Southern District of California, Central Division, on January 28, 1948, charges defendants on said date and since May 23, 1946, with the concealment of $25,000.00 and an automobile, from the trustee and receiver appointed by the Bankruptcy Court in said district, wherein they were adjudged bankrupts individually and as partners doing business as Pacific Firm-Bilt, contrary to 11 *U. S. C.* 52(b-1). Count II charges defendant, Amelia E. Noell, with a false oath in Schedule "F" of her bankruptcy petition on May 22, 1946, in the same proceeding and district, to the effect that she had no property interest in a 1941 Chevrolet Tudor Sedan automobile, contrary to 11 *U. S. C.* 52(b-2). Count III attempts to charge that defendant James A. Noell falsely swore before said Bankruptcy Court in said matter and district on June 3, 1946, that defendant Amelia E. Noell had sold and no longer owned said automobile, contrary to 11 *U. S. C.* 52(b-2). Defendants pleaded "not guilty" to each count, and upon entry of judgments of conviction on July 12, 1948 [Tr. 22, 24] appealed to this Court on July 19, 1948 [Tr. 27] which has jurisdiction thereof (28 *U. S. C.*, Secs. 1291, 1294(1); *F. R. Cr. P.*, Rule 37).

Statement of Facts.

Defendants are husband and wife and formed a partnership named Pacific Firm-Bilt to build houses. She also owned separate property.

The only evidence introduced to support Count I consists of incomplete records of the partnership business and of sales of her separate property by the wife, whence plaintiff's accountant deduced a large cash balance not surrendered to the bankruptcy receiver. His computations excluded many non-recorded partnership purchases and losses, besides the living and personal expenses of defendants. The verdicts were obviously based upon a presumption that, because defendants had certain cash months before bankruptcy, their financial condition was static and so continued despite defendants' uncontradicted evidence to the contrary.

Counts II and III depend entirely for their support upon the uncorroborated testimony of two confessed perjurers, who falsified their testimony in defendants' favor in the Bankruptcy Court that the Chevrolet car was sold, delivered and retained by John Buscemi until he resold it to a third party six months later, and as more particularly appears from the transfer records of the State Department of Motor Vehicles.

The sufficiency of the evidence being challenged, the same is analyzed with some 150 exhibits in the Fact-Brief (Appendix).

Statement of Points on Which Appellants Intend to Rely on Appeal.

1. The Court erred in denying the motion of the appellants for a judgment of acquittal.
   (a) At the conclusion of the Government's case.
   (b) At the conclusion of the whole case.
   (c) After the rendition of the verdict by the jury.
2. That the Court erred in confirming the verdict of the jury.
3. That the Government's case was wholly predicated on the fallacious doctrine of presumption of continued possession.
4. The Government's case is wholly lacking in any evidence to establish or reflect possession of any assets at the time of the appointment of the referee or trustee.
5. The proofs are wholly lacking in the establishing of any property at the time of the filing of the petition in bankruptcy by the appellants herein.
6. There is no evidence that Amelia A. Noell had anything whatsoever to do with the transaction asserted to have been had in respect to the Chevrolet automobile between J. P. Buscemi and James A. Noell.
7. The verdict of the jury herein returned and approved by the Trial Court is erroneous in that the same is contrary to law and is not supported by the evidence presented in the proceedings.
8. That the statements made in the schedules by Amelia E. Noell in respect to any interest in the Chevrolet automobile, were clearly justified under the facts established by the evidence.

9. That the answers made by the defendant, James A. Noell, in respect to the Chevrolet automobile were unqualifiedly true and correct and could not possibly constitute a false oath.

10. That the Court erred in refusing to strike the testimony of the witness Kirk, which was merely opinion evidence in view of his admission that he was arbitrarily rejecting the matters set forth in the bankruptcy schedules in regard to the disbursement to Schueles of Fifteen Thousand ($15,000.00) Dollars.

11. That the Court erred in admitting into evidence the testimony of the Postmaster at Roseburg, Oregon, for the purposes for which it was tendered.

12. The Court erred in receiving into evidenec an envelope addressed to Schueles, at Roseburg, Oregon.

13. That the Court erred in its prejudicial observations in respect to the black market transactions elicited during the testimony of the defendant, James E. Noell and Louis Stroh.

14. The Court erred in the manner in which the claim of James A. Noell of his rights to not incriminate himself was handled in the presence of the jury.

15. The Court erred in permitting the Government's attorney to cross-examine the defendants and appellants as to matters which they were not examined on in their examination in chief. The inquiry was designed for the manifest purpose of presenting fallacious inferences to the jury.

16. The Court erred in permitting the enlarged charts of an asserted analysis made by the witness, Kirk, to be

displayed to the jury in view of the manner in which said charts were set up and the characterizations therein reflected designed to emphasize the view of the expert witness Kirk, as distinguished from any factual matters in evidence.

17. That the evidence presented by the Government as a whole tended to merely establish that certain moneys had come into the possession of defendants at a time prior to the appointment of the receiver and trustee in bankruptcy, and that the Government's case entirely rests on the contention that said former possession created a presumption that said moneys were in possession of the defendants at the time of bankruptcy.

18. The Government's counsel was guilty of misconduct in his cross-examination of the defendants and appellants in regard to the person named Schueles, the manner of examination manifestly being intended to cast doubt upon the transaction with the said Schueles which was privileged.

19. The Court erred in receiving into evidence the multitudinous exhibits offered by the Government, which were at no time shown, exhibited or in any wise presented to the jury, *i.e.*, in the Trial Court. No exhibits were ever shown or exhibited to the jury at any stage of the trial.

20. The Indictment was procured contrary to law in that it is manifest that the record of bankruptcy proceedings before the Referee were presented to the grand jury and the record further discloses that appellants' counsel moved to quash the Indictment upon that ground.

ARGUMENT AND AUTHORITIES.

I.

Withholding From the Jury's Perception 150 Exhibits Whence the Prosecution and Conviction Depended Is Tantamount to the Denial of a Jury Trial as Guaranteed by the Constitution. (Points on Appeal Nos. 1, 2, 19.)

Facts.

The trial commenced May 25, 1948, and extended over the 26th, 27th and 28th days of May, the 2nd, 3rd, 4th, 8th, 9th, 10th, 11th, 15th and 18th days of June, 1948. The 1325 page transcript contains 1225 pages of testimony. The last numbered Government exhibit is "106" which, however, was preceded by some 35 others bearing sub-numbers. Defendants' last exhibit designation is "G." This was the evidence, as identified by its witnesses, and as interpreted by its expert, upon which the convictions were obtained. Its general nature appears in the *Appendix, post.*

Although the jury had to be satisfied beyond a reasonable doubt of the verity and import of that evidence before its interpretation, assembly and use in the auditor's charts[1] could be considered, it was neither read to or by the jury, nor taken to the jury room.[2] While the Court anticipated that they might take the exhibits [R. T. (V) 1260], he "wasn't surprised that it took so short a time for the jury to arrive at a verdict [p. 1292].

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[1]Pltf. Exs. 57, 58; R. T. 291-6, 708, 732; Point II, *post.*

[2]Defense counsel so stated in arguing motion for acquittal and he was not challenged [R. T. 1274].

That hiatus was rendered more prejudicial by the display over defense objections of two charts, prepared by F. B. I. accountant Kirk, which were not only inaccurate and incomplete reflections of defendants' business affairs, but involved matters not before the jury [Pltf. Exs. 57, 58; R. T. 291-6, 708, 732; see, *Point VII, post*].

In general, the only allusion, if any, to their identity came from the clerk as a particular item was marked for identification. He was not called upon to, nor would it have been proper for anyone, before the document was received in evidence, to have disclosed its contents to the jury. But with that perfunctory performance, the jury's enlightenment as to the contents or import of the writings ceased. Thereafter, the practice was for the prosecutor to prove the document by its identification reference, it was received in evidence with 106 others mostly at the close of plaintiff's case[3] and sealed in the archives to mock defendants, whose jury today does not know of their own knowledge that the documentary evidence upon which they convicted them was other than blank pieces of paper, or if they glimpsed any writing thereupon in passing, it could have been the current racing chart.

While such seance might be the stage effect desired by a Houdini, it is not the jury trial vouchsafed by the Constitution, nor here accorded defendants by a jury who, oblivious of the evidence, returned three verdicts against them in *one hour and 25 minutes!* [Tr. 14].

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[3]R. T. (I) 23, 26, 30, 52-4, 108-9, 117; R. T. (III) 677-721, 732, 767; R. T. (IV) 915-26, 929, 961, 1052; R. T. (V) 1143, 1154, 1173.

Government's counsel will not deny that immediately upon retirement of the jury in this cause, impanelment commenced of a jury in the case of *United States v. Kawakita*. It is the latter procedure that consumed most of the time aforementioned. The bailiff had, indeed, been advised of the verdict in this cause some twenty minutes after the jury had retired.

Authorities.

(1) The Constitutional vouchsafes a trial by jury to a defendant accused of crime. (*Ibid.*, Amend. VI; *F. R. Cr. P.*, Rule 23.) This includes the right to have the jury determine all facts in issue (*Murray v. U. S.*, 10 F. 2d 409), and precludes the Court's rejection of evidence regarded as improbable. (*Greenberg v. U. S.*, 3 F. 2d 226; *Haigler v. U. S.* (10 Cir.), 172 F. 2d 986, 988).

(2) The mechanics of receiving and marking documents in evidence, as part of the judicial process (*New York & C. M. S. & Co. v. Fraser*, 130 U. S. 611, 32 L. Ed. 1031), is separate and apart from, though a facility for, trial to a jury which contemplates that the evidence upon which their verdict is to be resolved is introduced within their perception.

> "Nothing is older or commoner in the administration of law, in all countries, than the submission to the senses of the tribunal itself, whether judge or jury, of objects which furnish evidence." (*Thayer's Cas. Evid.*, p. 713.)

> "Judicial evidence includes all testimony given by witnesses in court, all documents produced and read by the Court, and all things personally examined by the Court for the purposes of proof." (*I Chamberlayne, Evid.,* Sec. 7.)

Documentary evidence, therefore, must be either read or shown to the jury who, with the Court's approval, may also take the same for examination to the jury room.

> 38 *Cyc.* (Trial) 1335, 1337-8;
> *Holmgren v. U. S.,* 217 U. S. 509, 54 L. Ed. 861;
> *Winters v. U. S.,* 201 Fed. 845.

It is reversible error to lay a large number of writings, *unread,* before a jury for them to examine or not as they may feel inclined.

> *Barber's Appeal,* 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90, 99;
> *State v. McKee,* 73 Conn. 18, 47 Atl. 409, 49 L. R. A. 542, 548, 84 A. L. R. 124.

See, generally:

> *People v. Cochran,* 61 Cal. 548, 554;
> *People v. Balestieri,* 23 Cal. App. 708, 711-13;
> *People v. Dunlop,* 27 Cal. App. 460, 469-70;
> *People v. Abrams & Co.,* 112 Cal. App. Supp. 769.

Higgins v. L. A. Gas & E. Co., 159 Cal. 651, 655, holds that the rule permitting the jury to take exhibits with them is an enlargement of the common law whose restrictions were inspired by illiterate jurors.

(3) There is analogy between the denial of due process under the Fifth Amendment where the judge is unmindful of the effect of documents displayed and not seen by the jury during the trial, or the latter is held under circumstances of terrorism whence normal minds are paralyzed and the dropping of an iron curtain between evidence and jury which the triers of fact ought to have considered in reaching their verdict. Otherwise the pretense of a hearing before condemnation would be a sham. Whether or not it be regarded as an abridgment of due process, the intendments of a jury trial were denied.

Jordan v. Massachusetts (1912), 225 U. S. 167, 176;

Tumney v. Ohio (1927), 273 U. S. 510, 523, 531;

Frank v. Mangum (1915), 237 U. S. 309, 335;

Moore v. Dempsey (1923), 261 U. S. 86;

Powell v. Alabama (1932), 287 U. S. 45, 68.

Thus where an appellate court ordered judgment for defendant, in reversing the trial court's decision for plaintiff whose material evidence was in part erroneously excluded below, it was held, a denial of due process. (*Saunders v. Shaw* (1917), 244 U. S. 317.)

II.

There Is No Substantial Evidence to Support the Implied Findings That Either Defendant Concealed Cash From the Bankruptcy Receiver or Trustee, as Alleged in Count I. (Points on Appeal, 1, 2, 3, 4, 5, 7, 17.)

Facts.

The captioned contention was urged by each appellant in their several motions for an acquittal and a new trial, and argued at length, as appears from the Reporter's Transcript [Tr. 17, 18, 20, 21; R. T. 934, 1274]. Appellants also contend that the evidence is insufficient to support the implied finding that they concealed the car alleged in Count I, but this is separately presented (*Point III, post*). Indeed, there is nothing in the record to indicate whether the verdicts of guilty upon Count I resulted from a finding that defendants concealed cash or car, though the findings of guilt upon Counts II and III, involving alleged false oaths concerning the car, may suggest that the car, and not the cash, was the subject of concealment under Count I.

Plaintiff's case in chief was presented to show generally defendants' income from and expenses in their partnership business, together with the proceeds of sales of real property, comprised of the separate property of the wife. Plaintiff had access to and examined the books of account and records of defendants before trial, as did the Bankruptcy Court and its trustee. Plaintiff introduced in evidence a large number of business records, cancelled

checks, and bank statements, to show the financial condition of defendants' estate during the operation of the partnership and to and including their adjudication in bankruptcy. Upon that foundation, F. B. I. accountant Kirk prepared and expounded to the jury two charts [Exs. 57, 58] containing an alleged summary of defendants' income and outlays during said period, to show, so he claimed, approximately $32,000.00 received by defendants and unaccounted for. The unfairness of this presentation, however, is derived from several circumstances, besides the contention in Point I, that the foundational documents were never made accessible to the jury.

First: Mr. Kirk admittedly confined his summary[4] to these business records of defendants which they had surrendered to the Bankruptcy Court. It is undisputed that defendants' books of accounts were kept by a part-time bookkeeper, who called intermittently to post the entries therein, and that before the partnership business ceased operating, about the middle of May, 1946, bookkeeping was not carried on. The defendants are not on trial for a failure to keep books, nor is there any evidence that their failure to complete their postings before bankruptcy was due to any ulterior motive. Judicial notice may be taken of the fact that during that period all kinds of office help was at a high premium, and because of their financial difficulties and harassment by creditors defendants' affairs were naturally confused. They did, however, deliver to the receiver all memoranda of transactions not posted in their books.

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[4]His charts [Exs. 57, 58] are challenged as inadmissible in Point VII, *post.*

Second: There is another circumstance which demonstrates a further fallacy in Mr. Kirk's summary. It would appear beyond question that in so far as the partnership business was concerned, the same was insolvent and unable to pay its creditors as early as April, 1946. There is no evidence that defendant, James A. Noell, owned any property or had any income outside of the partnership. Conversely, the defendant wife owned several parcels of property, as her separate estate, which she liquidated during the latter period of the partnership in an endeavor to satisfy creditors and keep the business afloat. While *her* income from that or any other source during the time in question would be pertinent to the question of *her* concealment of assets, the same is entirely immaterial and irrelevant in so far as defendant husband's alleged concealment is concerned. Notwithstanding, Mr. Kirk, in his summary and presentation, included the wife's receipts from sales of her separate property with the joint receipts of defendants, and finding a balance of cash unaccounted for in the partnership records, characterized the same as concealment, which he and the Government attributed to BOTH defendants.

The evidence conclusively shows that, excepting for such tangible physical property as was surrendered to the bankruptcy receiver, the partnership was virtually destitute of cash months before the bankruptcy adjudication.

The foregoing was the only joint property that defendants owned or controlled, and is all of the property that they could have jointly concealed. While the evidence shows that the defendant wife did in fact use her proceeds from sales of property in the partnership business, there is no evidence that any surplus between her said receipts

and investments thereof in the partnership was ever under the control of or concealed by defendant husband.

As is apparent from a cursory examination thereof, the books of account surrendered by defendants to the Bankruptcy Court, and used by Mr. Kirk in his summary, do not purport to be the books of account of defendant wife or husband concerning their personal business or separate assets.

It would require a reproduction of the entire Reporter's Transcript of testimony to show in detail the foundation for the Government's contention. For purposes of this appeal no need is perceived therefor. The Appendix contains a summary of all of the documentary evidence. Plaintiff's contention that defendants concealed over $32,000.00 is based upon the following fallacies:

First: There is to be deducted the item of $15,000.00, which defendant husband advanced to Schueles for the purchase of lumber in Oregon, and of which no record was made in the partnership books.

Second: Insofar as *joint* concealment is concerned, there must be deducted from the cash receipts described by Mr. Kirk the proceeds from the wife's sales of separate property.

Third: There is no evidence that defendant husband had any cash assets or income after the partnership business ceased operating, or that defendant wife had any cash assets or income except from the proceeds of the sales of her separate property. It is conceded that from these proceeds she expended $16,636.58 in behalf of the partnership and family expenses. Defendants not only had the expenses of their family to maintain and that in-

cidental to the winding up of their business, but also legal and other expenses.

Fourth: Each defendant testified unequivocally that neither of them had any cash or assets, excepting personal effects, that were not surrendered to the bankruptcy receiver. There is no indication of any high living or extravagance, such as debtors with concealed assets of over $30,000.00, might be expected to occasionally indulge. On the contrary, there are compelling circumstances which indicate that defendants were as impoverished as their bankruptcy petitions portray. Defendant husband was experienced in business and a person of ordinary education. It would hardly be expected of one of his ability, with any substantial sum of money available, resorting to menial labor and the driving of a taxicab.

Fifth: Neither defendant was indicted for filing a false schedule nor for false swearing concerning cash assets, as was done in the case of the car (Counts II and III) and is to have been expected as to any money which the Government really believed was withheld. Plaintiff finally admitted to the trial court when sentences were pronounced that, despite audits and investigations by the bankruptcy trustee and F. B. I., numerous examinations in the Bankruptcy Court from June, 1946, into 1947, that the Government had been unable to discover one penny in defendants' possession or under their control after their assets were surrendered to the receiver upon his qualification in May, 1946 [R. T. (V) 1316, 1318]. In response to the Court's inquiry, the prosecutor said: "We don't know where it is, your Honor. We haven't been able through the investigation that has been caused to come on to any clues. We have some, but they are not the type that were admissible in evidence" [p. 1316].

The record of this prosecution is fairly indicative that were there so much as a fresh shoe shine or a newly patched bustle to arouse a suspicion of affluence, the bootblack and the harness maker would have been produced. The defendants were kept under too close surveillance by prying creditors before, as well as officials, after bankruptcy, to have harbored $32,000.00 without detection. Conversely, there is every reason to believe that in confusion, under pressure and with the savings of a lifetime in jeopardy, they frantically and disorderly liquidated and paid their debts while striving against a black market to obtain lumber as best they could. Debtors so beleagured and harassed without a very orderly system of bookkeeping in advance may be expected to dissipate assets in striving to turn the current and find themselves without written evidence of their transactions when the storm has swept all away.

Each defendant, as has been indicated, unequivocally denied having any cash at bankruptcy which was not surrendered to the receiver. They explained their receipts and disbursements at length and in detail. Mrs. Noell was cross-examined closely about cash withdrawals by her from the sale of her separate property and which she said was used to buy lumber, pay debts, operating and living expenses. Of course, the cash was not earmarked and she could not generally allocate it in her testimony, but there is no contradiction of her or her husband that it was all spent as of bankruptcy. To bridge this gap in its proof, the Government depends upon an asserted presumption of continued possession, which is unassailing.

For a summary of the evidence, see Fact Brief, Appendix, p. 1, *et seq.*

Argument.

(1) Conceding that "this contention calls for an examination of the basic facts as the jury could have found them from the evidence if every conflict in the testimony had been resolved in favor of the appellee" (*Todorow v. U. S.* (9 Cir.), 173 F. 2d 439, 443), there is no substantial evidence to support the essential elements of the crime charged (11 *U. S. C.*, 52 (b)(1)).

(2) Common law rules governing the application and weight attributable to presumptions and other evidence are subordinate to the Supreme Court's plenary authority to prescribe said matters in the administration of federal jurisprudence (*F. R. Cr. P.*, Rule 26). Referring to *McNabb v. U. S.*, 318 U. S. 332, 87 L. Ed. 819, the same Court observed in *U. S. v. Mitchell*, 322 U. S. 65, 88 L. Ed. 1140:

> "The McNabb decision was an exercise of our duty to formulate policy appropriate to criminal trials in the federal courts. We adhere to that decision and to the views on which it was based . . .
>
> "Practically the whole body of the law of evidence governing criminal trials in the federal courts has been judge made (citations). Naturally these evidentiary rules have not remained unchanged. They have adapted themselves to progressive notions of relevance in the pursuit of truth, through adversary litigation, and have reflected dominant conceptions of standards appropriate for the effective and civilized administration of law . . ."

(3) The Bankruptcy Act not only requires the bankrupt to surrender all his assets to the receiver or trustee, but provides a dragnet discovery mechanism (11 *U. S. C. A.*, Secs. 25, 11(a-7), 75(a-1) whence the judicial proc-

ess has evolved a turnover proceeding "by which the Court seeks efficiently and expeditiously to accomplish ends prescribed by the statute, which, however, left the means largely to judicial ingenuity . . ."

> "In applying these grants of power, courts of bankruptcy have fashioned the summary turnover procedure as one necessary to accomplish their function of administration. It enables the court summarily to retrieve concealed and diverted assets or secreted books of account, the withholding of which, pending the outcome of plenary suits, would intolerably obstruct and delay administration. When supported by 'clear and convincing evidence,' the turnover order has been sustained as an appropriate and necessary step in enforcing the Bankruptcy Act (citations). . . .
>
> "*The nature and derivation of the remedy make clear that it is appropriate only when the evidence satisfactorily establishes the existence of the property or its proceeds, and possession thereof by the defendant at the time of the proceeding. While some courts have taken the date of bankruptcy as the time to which the inquiry is directed, we do not consider resort to this particular proceeding appropriate if, at the time it is instituted, the property and its proceeds have already been dissipated, no matter when that dissipation occurred.* Conduct which has put property beyond the limited reach of the turnover proceeding may be a crime, or if it violates an order of the referee, a criminal contempt, but no such acts, however reprehensible, warrant issuance of an order which creates a duty impossible of performance, so that punishment can follow . . ." (*Maggio v. Zeitz* (1948), 333 U. S. 56, 61, 62, 66, 92 L. Ed. 476, 482-3, 485.)

There is a powerful presumption that his official duty was performed by the referee (22 *C. J. S.* (Evid.), Sec. 589, p. 906; 31 *C. J. S.* (Evid.), Sec. 146; *Williamson etc. Co. v. London,* 154 Okla. 24, 6 P. 2d 671; *Wheeler-Fisher & Co. v. Comm. Int. Rev.,* 54 F. 2d 294). Since no turnover order was made for the cash allegedly concealed under Count I, it must be presumed that the referee determined that none was withheld, and so not concealed, by either defendant.

(4) The foregoing presumption adds weight to that of innocence, which prevails until the jury is satisfied beyond a "reasonable doubt" from "substantial evidence" that defendants wilfully concealed their assets.

Coffin v. U. S., 162 U. S. 664, 40 L. Ed. 1109;
Hersh v. U. S. (9 Cir.), 68 F. 2d 799, 804;
Reiner v. U. S. (9 Cir.), 92 F. 2d 823, 824-5.

(5) There is no evidence that the husband owned or controlled any cash as of bankruptcy, excepting that surrendered to the receiver, or that he aided or abetted his co-defendant wife in concealing any of the proceeds from the sales of her separate property or that she had or concealed the same when the receiver was appointed.

The evidence is clear and uncontradicted that defendant wife invested certain proceeds of sales of her separate property in the partnership for the payment of its debts and the operation of its business. Had any of that money been owned by the partnership as of bankruptcy and not surrendered, both defendants, as partners, may have been liable. If the wife retained any residue which she did not surrender she may have been guilty. But the latter hypothesis admits no guilt in the husband unless he aided and abetted her upon and after the appointment of a receiver.

There is not any iota of evidence that, if the wife withheld any of her separate funds after bankruptcy, the husband had any knowledge thereof or participated therein.

Under the law of California, where defendants resided, "husband and wife may hold property as joint tenants, tenants in common, or as community property." (*Civil Code,* Sec. 161.) Separate property is any property "acquired before marriage and that acquired afterwards by gift, bequest, devise, or descent, with the issues and profits thereof." (*Ibid.,* Secs. 162, 163.) "The wife may, without the consent of her husband, convey her separate property." All other property acquired by either spouse after marriage is community property (*Ibid.,* Sec. 164). "Neither husband nor wife has any interest in the property of the other, but neither can be excluded from the other's dwelling." (*Ibid.,* Sec. 157.) Husband and wife may contract with each other concerning property as though unmarried, subject to the rules governing persons in a confidential relationship (*Ibid.,* Sec. 158).

By virtue of the latter section, husband and wife may form a partnership and transact business and hold property as such.

Valensin v. Valensin, 28 Fed. 599;
Williams v. Tam, 131 Cal. 64.

Under the *Uniform Partnership Act* in California (*Civil Code,* Sec. 2395 *et seq.*) "a partner is co-owner with his partners of specific partnership property holding as a tenant in partnership," and whose dominion of such property is limited to partnership uses (*Ibid.,* Sec. 2419), the title to which is in the partnership (*Ibid.,* Sec. 2402).

A husband with authority to sign checks and draw money from a partnership wherein his wife is a member,

does not make him a partner nor interested in her separate property (*Bank & Trust Co. v. Gearhart,* 45 Cal. App. 421, 422). Nor is he liable for her torts.

> "For civil injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be liable therefor, except in cases where he would be jointly liable with her if the marriage did not exist." (*Civil Code,* Sec. 171(a).)

Husband and wife were liable for their community debts (*Ibid.,* Secs. 167, 171) and were jointly and severally liable for the partnership debts (*Ibid.,* Sec. 2409). In these circumstances they sought bankruptcy adjudications as individuals and partners and surrendered their assets as such (*Act,* Secs. 4, 5; 11 *U. S. C. A.,* Secs. 22, 23). Each is regarded as a separate entity (*I Remington, Bankr.,* Secs. 45, 67, 73 *et seq.*). A married woman, where a plea of coverture does not avail her, is a separate entity in bankruptcy insofar as her separate estate is concerned.[5]

Nothing in the partnership or husband's petition "concealed" any asset of the wife, who is separately charged in Count II with falsely swearing that she owned no interest in a car. That none of the bankruptcy petitions or schedules are evidence of the concealment of "cash" is demonstrated by the failure of the Government to separately charge husband and wife with false oaths concerning their "cash" disclosures. If the latter findings did not constitute acts of concealment, certainly the husband's petition did not aid and abet the wife to conceal her separate cash.

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[5]*In re Lyons* (Cal. 1874), Fed. Cas. #10,397; *McDonald v. Tefft Weller Co.* (Fla.), 128 Fed. 381; *In re Johnson* (N. Y.), 149 Fed. 864; *cf. In re Dixon* (Mich.), 18 F. 2d 961.

(6) There is no direct evidence that defendants concealed assets. Their convictions under Count I, as to the cash, depends upon the legal sufficiency of circumstantial evidence. The modern mania for words, signs and formulas, in preference to reality, has constrained perceiving courts to test their moorings. The common counterfeit for evidence gains currency from wishful thinking and an abandoned disregard for truth. The fallacy is not novel. To this mesmerism is added the smog from an asserted presumption of continued possession. Lacking evidence of concealment when the trustee qualified, the Government would bridge a gap of months with the presumption that, because the bankrupts were once affluent, they continued so notwithstanding their subjection to the toils of the bankruptcy law.

So careless has been the use of this presumption that its normal restrictions are spurned. As defined in California and elsewhere, it is *disputably* presumed "that a thing once proved to exist continues *as long as is usual with things of that nature*" (*C. C. P.*, Sec. 1963). It is limited to a fact of a "continuous nature" (31 *C. J. S.* (Evid.), Sec. 124). Accordingly, it is uniformly held that continued solvency or insolvency, or that a bank balance or the value of property, continues to exist. "Human experience," upon which such deductions depend, denies such presumption.

Scott v. Wood, 81 Cal. 398, 404-5;

Coghill v. Boring, 15 Cal. 213, 219;

High v. Bank of Commerce, 103 Cal. 525, 527;

Estate of Delaney, 32 Cal. 176;

Pettit v. Forsyth, 15 Cal. App. 149;

Richards v. Dower, 81 Cal. 44;

Shaffer v. Noziglia, 64 Cal. App. 93;

People v. Caldwell, 55 Cal. App. 2d 238;

31 *C. J. S.* (Evid.), Sec. 124, p. 736, *et seq.,* p. 742.

The rule is "limited in its application to such facts and conditions as are of a continuing nature."

22 *C. J. S.* (Cr. L.), Sec. 588, p. 903;

Brooks v. U. S. (8 Cir. 1906), 146 Fed. 223, 229;

Breitmayer v. U. S. (6 Cir. 1918), 249 Fed. 929, 934.

There is so much analogy between the fundamental issues involved in an alleged criminal concealment of assets and the violation of a turnover order that what is settled by *Maggio v. Zeitz* (1947), 333 U. S. 56, 92 L. Ed. 476, as to the latter is pertinent to the former. Several months before adjudication, the bankrupt in the cited case was proven to have possessed certain assets which the Bankruptcy Court later ordered him to turn over and in default of which he was adjudged in contempt until he complied. There was no evidence in the contempt proceeding to contradict his testimony that he no longer possessed said assets. In reversing the 2nd Circuit (157 F. 2d 951), which had affirmed the turnover order (145 F. 2d 241), the Supreme Court said (92 L. Ed 484-6):

> "It is evident that the real issue as to turnover orders concerns the burden of proof that will be put on the trustee and how he can meet it. This Court has said that the turnover order must be supported by 'clear and convincing evidence,' Oriel v. Russell, 278 U. S. 358, 73 L. ed. 419, 49 S. Ct. 173, 13 Am. Bankr. N. S. 121, and that includes proof that the property has been abstracted from the bankrupt estate and is in the possession of the party proceeded

against. It is the burden of the trustee to produce this evidence, however difficult his task may be.

"The trustee usually can show that the missing assets were in the possession or under the control of the bankrupt at the time of bankruptcy. To bring this past possession down to the date involved in the turnover proceedings, the trustee has been allowed the benefit of what is called a presumption that the possession continues until the possessor explains when and how it ceased. This inference, which might be entirely permissible in some cases, seems to have settled into a rigid presumption which it is said the lower courts apply without regard to its reasonableness in the particular case.

"*However, no such presumption, and no such fiction is created by the bankruptcy statute. None can be found in any decision of this Court dealing with this procedure.* Language can, of course, be gleaned from judicial pronouncements and texts that conditions once existing may be presumed to continue until they are shown to have changed. But such generalizations, useful enough, perhaps, in solving some problems of a particular case, are not rules of law to be applied to all cases, with or without reason.

"Since no authority imposes upon either the Court of Appeals or the Bankruptcy Court any presumption of law, either conclusive or disputable, which would forbid or dispense with further inquiry or consideration of other evidence and testimony, turnover orders should not be issued, or approved on appeal, merely on proof that at some past time property was in possession or control of the accused party, unless the time element and other factors make that a fair and reasonable inference. Under some circumstances it may be permissible, in resolving the unknown from the known, to reach the conclusion of present con-

trol from proof of previous possession. Such a process, sometimes characterized as a 'presumption of fact,' is, however, nothing more than a process of reasoning from one fact to another, an argument which infers a fact otherwise doubtful from a fact which is proved.

"Of course, the fact that a man at one time had a given item of property is a circumstance to be weighed in determining whether he may properly be found to have it at a later date. But the inference from yesterday's possession is one thing, that permissible from possession twenty months ago quite another. With what kind of property do we deal? Was it salable or consumable? The inference of continued possession might be warranted when applied to books of account which are not consumable or marketable, but quite inappropriate under the same circumstances if applied to perishable merchandise or salable goods in considerable demand. Such an inference is one thing when applied to a thrifty person who withdraws his savings account after being involved in an accident, for no apparent purpose except to get it beyond the reach of a tort creditor, see Rosenblum v. Marinello (C. C. A. 2d N. Y.) 133 F. 2d 674, 52 Am. Bankr. N. S. 46, it is very different when applied to a stock of wares being sold by a fast-living adventurer using the proceeds to make up the difference between income and outgo.

"Turnover orders should not be issued or affirmed on a presumption thought to arise from some isolated circumstance, such as one time possession, when the reviewing court finds from the whole record that the order is unrealistic and unjust. No rule of law requires that judgment be thus fettered; nor has this Court ever so prescribed. Of course, deference is due to the trial court's findings of fact, as prescribed

by our rules, but even this presupposes that the trier of fact be actually exercising his judgment, not merely applying some supposed rule of law. In any event, rules of evidence as to inferences from facts are to aid reason, not to override it. And there does not appear to be any reason for allowing any such presumption to override reason when reviewing a turnover order.

"We are well aware that these generalities do little to solve concrete issues. The latter can be resolved only by the sound sense and good judgment of trial courts, mindful that the order should issue only as a responsible and final adjudication of possession and ability to deliver, not as a questionable experiment in coercion which will recoil to the discredit of the judicial process if time proves the adjudication to have been improvident and requires the courts to abandon its enforcement."

In at least two recent cases, this Court has refused to apply said presumption in the absence of other facts warranting an inference of concealment. Other applications are found in the exhaustive annotation in 92 L. Ed. 502.

See:

Hersh v. U. S. (9 Cir.), 68 F. 2d 799, 804;
Reiner v. U. S. (9 Cir.), 92 F. 2d 823, 824-5.

(7) The *Hersh* case emphasizes, as it did with great elaboration in *Rachmit v. U. S.* (9 Cir. 1930), 43 F. 2d 878, 880, that concealment before the qualification of the receiver or trustee is not interdicted, as does *U. S. v. Yasser* (3 Cir. 1940), 114 F. 2d 558, followed by *U. S. v. Schireson* (3 Cir. 1940), 116 F. 2d 881, 132 A. L. R. 1157, 1161, 1162, which holds that even though the bank-

rupt concealed $4,000.00 with his wife several months before bankruptcy, this is not evidence of his interest therein at the later critical date. The Court said *inter alia:*

> "A man who is not a bankrupt may have buried treasure all over the world. He commits no offense under the Bankruptcy Act. . . ." (1161.)
>
> "Under these circumstances the inference that there was anything left from this $4,000.00, in Miss Roberts' hands on April 22, 1937 (bankruptcy) when the money had been turned over in the summer and fall of 1936, *is not one which can be drawn without more proof than the mere turning over of the money.*" (Cit. *U. S. v. Reiner, supra.*)

Accord:

U. S. v. Tatcher (3 Cir. 1942), 131 F. 2d 1002.

(8) *Maggio v. Zeitz, supra*, discusses the sufficiency of other evidence to warrant a finding of withholding or concealment, and says (92 L. Ed. 488-90):

> "The fact that the contempt proceeding must begin with acceptance of the turnover order does not mean that it must end with it. Maggio makes no explanation as to the whereabouts or disposition of the property which the order, earlier affirmed, declared him to possess. But time has elapsed between issuance of that order and initiation of the contempt proceedings in this case. He does tender evidence of his earnings after the turnover proceedings and up until November 1944; his unemployment after that time allegedly due to his failing health; and of his family obligations and manner of living during the intervening period. He has also sworn that neither he nor his family has at any time since the turnover proceedings

possessed any real or personal property which could be used to satisfy the trustee's demands. And he repeats his denial that he possesses the property in question.

"It is clear that the District Court in the contempt proceeding attached little or no significance to Maggio's evidence or testimony, although the Court gave no indication that the evidence was incredible. The District Court in its opinion cites only *Re* Siegler (C. C. A. 2d N. Y.), 31 F. 2d 972, 14 Am. Bankr. N. S. 15, in which the Court of Appeals reversed a District Judge who, because he believed the bankrupt's testimony, had refused to commit him for contempt. The Siegler case and other cases decided by the Court of Appeals apparently led the District Judge to conclude that no decision other than commitment of Maggio would be approved by that court.

"Nor did the Court of Appeals, reject this view. Indeed it affirmed the commitment for contempt because it considered either that present inability to comply is of no relevance or that there is an irrebuttable presumption of continuing ability to comply even if the record establishes present inability in fact. It seems to be the view that this presumption stands indefinitely, if not permanently, and can be overcome by the accused only when he affirmatively shows some disposition of the property by him subsequent to the turnover proceedings. We do not believe these views are required by Oriel v. Russell, 278 U. S. 358, 73 L. Ed. 419, 49 S. Ct. 173, 13 Am. Bankr. N. S. 121, despite some conflicting statements in the opinion,

which the Court of Appeals construed as compelling affirmance of the contempt decree.

"This Court said in the Oriel case that a 'motion to commit the bankrupt for failure to obey an order of the Court to turn over to the receiver in bankruptcy the property of the bankrupt is a civil contempt and is to be treated as a mere step in the proceedings to administer the assets of the bankrupt as provided by law, and in aid of the seizure of those assets and their proper distribution. While in a sense they are punitive, they are not mere punishment—they are administrative but coercive, and intended to compel, against the reluctance of the bankrupt, performance by him of his lawful duty.' 278 U. S. 358 at 363, 73 L. ed. 419, 424, 49 S. Ct. 173, 13 Am. Bankr. N. S. 121.

"Of course, to jail one for a contempt for omitting an act he is powerless to perform would reverse this principle and make the proceeding purely punitive, to describe it charitably. At the same time, it would add nothing to the bankrupt estate. That this Court in the Oriel case contemplated no such result appears from language which it borrowed from a Circuit Court of opinion, which, after pointing out that confinement often failed to produce the money or goods, said, 'Where it has failed, and where a reasonable interval of time has supplied the previous defect in the evidence, and has made sufficiently certain what was doubtful before, namely, the bankrupt's inability to obey the order, he has always been released, and I need hardly say that he would always have the right

to be released, as soon as the fact becomes clear that he cannot obey.' Moreover, the authorities relied upon in Chief Justice Taft's opinion make it clear that his decision did not contemplate that a coercive contempt order should issue when it appears that there is at that time no wilful disobedience but only an incapacity to comply. Indeed, the quotation from *Re* Epstein, cited *supra* (note 4), also stated at p. 569: 'In the pending case, or in any other, the court may believe the bankrupt's assertion that he is not now in possession or control of the money or goods, and in that event the civil inquiry is at an end."

Again (92 L. Ed. 490-1):

"Of course, if he offers no evidence as to his inability to comply with the turnover order, or stands mute, he does not meet the issue. Nor does he do so by evidence or by his own denials which the court finds incredible in context.

"But the bankrupt may be permitted to deny his present possession and to give any evidence of present conditions or intervening events which corroborate him. The credibility of his denial is to be weighed in the light of his present circumstances. . . ."

It was held in *Hersh v. U. S.* (9 Cir.), 68 F. 2d 799, 804:

"The burden of proof was upon the government to show the concealment of the funds alleged in the indictment. In view of the fact that the concealment relied upon consisted in the transfer of moneys to Klein and Auerbach several months before the trus-

tee qualified, it was essential to show that this concealment continued down to the time the trustee was appointed and thereafter, with intent to deprive the trustee and the creditors of the aforementioned sum."

The foregoing is quoted by this Court in *Reiner v. U. S.* (9 Cir.), 92 F. 2d 823, 825, where the bankrupt did not expressly account for a substantial sum, but it was held:

> "There is *no evidence that this was not* expended in necessary living expenses between April 24th and July 7th. The appellee failed to maintain its burden of proof that there was any of it left to conceal on July 7th."

Certain it is that where circumstantial evidence is relied upon to prove concealment, it must establish more than suspicion and is insufficient unless inconsistent with defendants' innocence. The case at bar is within the condemnation of *U. S. v. Ross,* 92 U. S. 281, 283, 23 L. Ed. 707, where it was held:

> "They are inferences from inferences: presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable drawn from premises which are uncertain."

Reversing a conviction, *Wesson v. U. S.* (8 Cir., 1949), 172 F. 2d 931, 933-5, held:

> "Before considering the nature of the circumstances relied upon it is well to have in mind the rule of law

relative to the probative force of such evidence. Even in a conspiracy case, which is ordinarily not susceptible of proof by direct evidence, facts and circumstances to sustain a verdict must be such as legitimately tend to sustain an inference. Inferences must be based upon proven fact or facts of which judicial notice must be taken and one inference cannot be based upon another inference. To sustain a finding of fact the circumstances proven must lead to the conclusion with reasonable certainty and must be of such probative force as to create the basis for a legal inference and not mere suspicion. Circumstantial evidence, even in a civil case, is not sufficient to establish a conclusion where the circumstances are merely consistent with such conclusion or where they give equal support to inconsistent conclusions. Adair v. Reorganization Investment Co., 8 Cir., 125 F. 2d 901; Southern R. Co. v. Stewart, 8 Cir., 120 F. 2d 85; Hoskins v. United States, 8 Cir., 120 F. 2d 464; Massachusetts Protective Assn. v. Mouber, 8 Cir., 110 F. 2d 203. In Read v. United States, 8 Cir., 42 F. 2d 636, 638, which was a criminal case, this court, in an opinion by the late Judge Kenyon, said: 'The law applicable to the first proposition (the question of the sufficiency of the evidence) is well settled in this circuit.' In Salinger v. United States, 8 Cir., 23 F. 2d 48, 52, this court said: 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and, where all the evidence is as consistent with innocence as with guilt, it is the duty of this court to reverse a judgment against the accused.'"

III.

There Is No Evidence to Support the Implied Finding That Defendant, Amelia E. Noell, Concealed the Automobile as Alleged in Count I. (Points on Appeal, 1, 2, 4, 5, 6, 7.)

Foreword. Point IV, *post,* presents the insufficiency of the evidence to show that the husband concealed the car alleged in Count I; Points V and VI, *post,* the insufficiency of the evidence to show the wife's and husband's false oaths, respectively, concerning the same car, as alleged in Counts II and III. All of the testimony and exhibits pertinent to said subjects with transcript references are narrated in the Fact Brief (Appendix p. 10, *et seq., post*); as the same is interrelated as to each count, it is hoped to serve the presentation of each of said contentions, avoid repetition, and conserve space with one summary of the facts at this place.

Discussion of Evidence. Defendant wife owned the Chevrolet as her sole and separate property, together with several parcels of realty hereinbefore referred to. Defendants' business partnership was so involved by May 13, 1946, that the wife had not only liquidated her realty to pay debts and living expenses, but on that date the partnership business was attached and on May 22nd next the bankruptcy petitions were filed.

Defendants knew John and Lena Buscemi *et ux.* from their partnership's sale of lumber to the latter, who purchased a carload as late as May 1, 1946. Mr. Noell was supervising the building of their house and thereafter assisted him in the taxi and chicken business. Before

May 9th, Buscemi operated a taxi cab, Chrysler and Buick, in his taxi business at Rosemead. On the latter date he wanted to buy defendant wife's Chevrolet for the ceiling price and they (defendants and John Buscemi) rode in Buscemi's Chrysler to his lawyer's (Macbeth) office in Los Angeles, where the ceiling was ascertained to be $846.00. At the request of Buscemi, who does not write or read English, Mrs. Noell filled out his check in that amount, which he then signed and delivered to her concurrently with their signing the pink slip and registration, which she delivered to him. They then returned to defendants' home in Monrovia, where the latter delivered two sets of keys for the Chevrolet to Buscemi, who drove it away. May 13, 1946, Mrs. Noell cashed the check. About that time Mrs. Buscemi inquired of an employee, Stroh, how to have the car transferred into their names and he told her.

In June, 1946, the Chevrolet was in an accident while driven by one Stroh, then employed by Buscemi, and towed to the Uplands Garage for repairs. Buscemi, Stroh, Noell, and a third party, who was not a witness, went to the police department where an accident report was filed. Buscemi had insured the car and at his request Stroh presented a claim to the insurance carrier. Buscemi, then about to leave for the East, signed a check in blank for Noell to pay the repair bill when ascertained and a written authorization for Noell to pick up the car and use it, which he did. Upon his return from the East, Buscemi received and retained all the proceeds from his insurance claim.

In November, 1946, Buscemi had the car repainted, installed five new tires, and held it "for sale" at $1,500.00. While Noell was driving it, Mr. Palm negotiated with Buscemi for its sale for $1,425.00. Those three went to the bank where Buscemi executed and delivered his pink slip and bill of sale for and delivered the car to Palm upon the latter paying him $1,425.00 in cash with bills for $1,000.00, four $1.00 and $25.00. Palm had the title transferred into his name and is the last person seen with the car in this case.

Each defendant testified that all their property was surrendered to the receiver.

The foregoing summary is supported by the official records which plaintiff sought to impeach by John and Lena Buscemi, who testified to the same effect in the Bankrupcty Court in June, 1946, until F. B. I. accountant Kirk discussed the matter with them 100 times. However, when the Buscemis' contradictions and self-confessed perjury is scrutinized independently of their conclusions and with the presumption of innocence, there really is no substantial conflict as to essentials that are relevant to the alleged concealment of the car and the false oath of defendants concerning the same.

John Buscemi testified that upon leaving the lawyer's office, Mrs. Noell lamented her lack of a car, that he told her she could have it back. Of course, she then had his check, he had the pink slip, and nothing was to prevent their concealing the transfer but their lack of accord. There is no pretense that they agreed upon the terms of

a re-sale or that Buscemi ever executed a transfer of his pink slip until his sale to Palm six months later. Mr. and Mrs. Buscemi each testified to their purchase and ownership of the car in the Bankruptcy Court until Mr. Kirk took them in hand. Conversely, defendants testified that upon delivering the car to Buscemi he did tell Mrs. Noell that she could use any of his cars or taxis, when needed, and they in fact did so.

John Buscemi further testified that three days after the sale defendant husband handed him an envelope containing what he believed was currency. Mr. Noell did not say what the envelope was for, nor was there any transfer of title or possession of the car.

These incredible fantacies were followed by Buscemi's collection and retention of the insurance and the sale of the car to Palm, of which latter he added in contradiction of Palm and Noell that upon receipt of the $1,425.00 he and Noell went behind the bank where he gave Noell the money and the latter loaned him $1,000.00, which he deposited in the Rosemead bank and which those bank records denied. He said that two months later he repaid Noell by cashing a check for $1,000.00 and giving Noell the difference between what Buscemi owed him for the loan ($1,000.00) and what Buscemi owed him for materials for Buscemi's house! If figures don't lie, neither do liars always figure what they are saying. According to Mr. Buscemi, "payment" is like reducing an over-draft by drawing more checks against it. He and his wife admit testifying in the Bankruptcy Court that John Buscemi received and kept all of the $1,425.00 from the sale to Palm.

Argument.

From the foregoing, these conclusions seem inescapable:

(1) There was no agreement for nor any transfer of any interest in the car by Buscemi to Mrs. Noell after the sale.

(2) Mrs. Noell did not participate in or authorize any transaction concerning the car after the sale other than as she used it intermittently with Buscemi's permission.

(3) There is no evidence that, if Mr. Noell handed Buscemi $846.00 three days after the sale, Mrs. Noell had any pact therein or that the money was paid for an interest in the car for either defendant.

(4) Buscemi had and retained absolute ownership and possession of the car until the Palm sale and defendants' intermittent use was that of gratuitous borrowers and bailees.

The foregoing, with applicable amplification, is also the basis for appellants' contentions under Points IV, V, and VI, *post.*

Authorities.

(1) Buscemi's testimony concerning his arrangement with Mrs. Noell and receipt of money from Mr. Noell, without indication of its amount or purpose, is inherently preposterous and incredible and insufficient to support a finding (*Neblett v. Elliott,* 46 Cal. App. 2d 294).

(2) Whether or not defendant wife retained or received any interest in the car is governed by local law (*Erie R. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188).

(3) Defendant wife's contract with Buscemi was for the immediate transfer of her car to him for the payment of the agreed price. It was completely executed with reciprocal delivery of property and price and thus a sale (*Cal. Civ. Code,* Secs. 1721, 1796, 1729, 1738, 1739 (Rule 1), 1761, 1762). It was also sanctified by defendant's transfer to Buscemi of the "pink slip," or certificate of ownership, the indicia of title, and the issue of a new certificate to him, under California Vehicle Code, Secs. 175-186; *Rosenberg v. Beales,* 56 Cal. App. 212.

In contrast with the uncorroborated testimony of perjurer Buscemi, that he thereafter told defendant she could have the car, the foregoing entitled defendant to an instruction that an absolute sale was presumed and must be so found in the absence of substantial evidence to the contrary.[7]

(4) Since there is no evidence of a contract for defendant's retention of an interest in the car (*Civil Code,* Sec. 1726), she could only have been invested therewith by a subsequent contract to sell from Buscemi (*Ibid.* 1721) which necessitated a meeting of minds upon subject matter, price and terms (*Ibid.,* Secs. 1550, 1723, 1729, 1738, 1761-3, 1796). There is no evidence of such contract.[8]

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[7]*Chadowski v. U. S.* (Ill. 1912), 194 Fed. 858.

[8]*McClintock v. Robinson,* 18 Cal. App. 2d 577, 582; *Chas. Brown & Sons v. White Lunch Co.,* 92 Cal. App. 457; *Jules Levy & Bros. v. Mautz & Co.,* 16 Cal. App. 666; *Rest. (Contracts),* Sec. 32.

(5) In the absence of delivery, part payment or a written memorandum of such contract under the Statute of Frauds (*Civ. Code,* Sec. 1724), such contract is unenforceable. Secs. 2981, 2982, *Civil Code,* were added in 1945 to prescribe the formalities for a contract for the conditional sale of a motor vehicle, whose violation renders the same "unenforceable," except by "a purchaser for value."[9]

(6) A purported sale made without delivery of the certificate is unlawful and ineffective to pass title,[10] except by estoppel which at least requires a change of possession.[11]

On appeal oral testimony "in conflict with contemporaneous documents" is given "little weight, particularly when the crucial issues involve mixed questions of law and fact" (*U. S. v. U. S. Gypsum Co.* (1947), 333 U. S. 364, 396, 92 L. Ed. 746, 766).

(7) Defendant wife did not receive from Buscemi a gift of the car nor of any interest therein which, besides the registration requirements, "is not valid, unless the means of obtaining permission and control of the thing are given, nor, if it is capable of delivery, unless there

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[9]*Carter v. Seaboard Finance Co.,* 85 A. C. A. 773, 193 P. 2d 985.

[10]*Vehicle Code,* Secs. 176, 186; *Ludwig v. Steger,* 99 Cal. App. 235; *San Joaquin, etc. Co. v. Prather,* 123 Cal. App. 379; *Sly v. American Ind. Co.,* 127 Cal. App. 202; *Coca-Cola B. Co. v. Feliciano,* 32 Cal. App. 2d 351.

[11]*Civil Code,* Secs. 1743(1), 3543; *Kenny v. Christianson,* 200 Cal. 419; *Dennis v. Bank of America,* 34 Cal. App. 2d 618; *LeGrand v. Russell,* 52 Cal. App. 2d 279.

is an actual or symbolical delivery of the thing to the donee (*Civ. Code,* Sec. 1147). A mere promise to make a gift is *nudum pactum* and unenforceable.[12] "An uncompleted attempt to make a gift in trust" vested "no right in the donee" (*Holbrook v. Smith* (1948), 87 A. C. A. 81, 88).

(8) If, despite the foregoing, it should be assumed that defendant wife retained or received some secret interest in the car in the Buscemi transaction, on May 9, 1946, there is no evidence that she held such or any interest therein after he sold and delivered possession of the car to a third party in November, 1946; and thus no evidence that she "concealed" said property from the receiver or trustee.[13]

(9) It follows that, although a false bankruptcy schedule, as alleged in Count II, may be an act of concealment,[14] defendant wife's schedules were true as to her non-interest in the car when she became a bankrupt (Point II, *post*), and did not conceal an interest which she did not own.[15]

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[12]*Gordon v. Barr,* 13 Cal. 2d 596, 601; *Barham v. Khoury,* 78 A. C. A. 225, 230-1; *Foltz v. First T. & S. Bank,* 86 A. C. A. 63, 65.

[13]*Accord: U. S. v. Hersh,* 68 F. 2d 799, 804; *U. S. v. Yasser* (3 Cir. 1940), 144 F. 2d 558; *U. S. v. Schireson* (3 Cir. 1940), 116 F. 2d 881; *U. S. v. Tatcher* (3 Cir. 1942), 131 F. 2d 1002.

[14]*Duggins v. Heffron* (9 Cir. 1942), 128 F. 2d 546; *Goetz v. U. S.* (Ill.), 59 F. 2d 511; *U. S. v. Shapiro* (Wis.), 101 F. 2d 375; *Coghlan v. U. S.* (N. D. 1945), 147 F. 2d 233 (cert. denied, 325 U. S. 888).

[15]*U. S. v. Schireson* (3 Cir. 1940), 116 F. 2d 881, 132 A. L. R. 1157.

IV.

There Is No Evidence to Support the Finding That Defendant Husband Concealed an Automobile as Alleged in Count I. (Points on Appeal, 1, 2, 4, 5, 6, 7.)

Argument.

There is no evidence of any title to the car in Mr. Noell at any time and plaintiff's theory throughout, as expressed in Counts II and III, has been that the wife retained ownership or an interest after the sale to Buscemi. Certainly there is no evidence of any contract for the husband to buy the car. Buscemi does not assert that, when he says Mr. Noell handed him an envelope of cash, there was any application of the same or even a purpose expressed as to its use or any arrangement for the sale of the car. And certainly there was no recorded transfer of the car to the husband nor credible evidence that he ever acquired any interest therein.

If he could not have concealed it as his own asset, wherein did he aid and abet his wife after bankruptcy. His schedules and those of the partnership (privileged in any event) properly omitted reference to property which neither owned and was not interested in. His examination by the Bankruptcy Court is privileged. When he drove the car after bankruptcy, he used it either for himself or in Buscemi's business. When he assisted Buscemi collect his insurance claim and sell the car, he was not concealing anything for his wife.

Authorities.

(1) *Nye & Nisson v. U. S.* (Adv. Op. 1949), 93 L. Ed. 752, 756, 757, describes aiding and abetting as follows:

"In order to aid and abet another to commit a crime, it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.' (L. Hand, J., in *U. S. v. Peoni* (C. C. A. 2 N. Y.), 100 F. (2d) 401, 402)."

". . . It makes a defendant a principal when he consciously shares in any criminal act whether or not there is a conspiracy . . . Aiding and abetting rests on a broader base; it states a rule of criminal responsibility for acts which one assists another in performing . . ."

Defendant husband did not aid or abet a concealment by his wife.[16]

(2) The truth and immateriality of this testimony alleged as a false oath under Count III is discussed in Point VI, *post*.

(3) Defendant's testimony (Count III) in his examination under 11 *U. S. C. A.*, Sec. 25(a-10) is inadmissible "in evidence against him *in any criminal proceeding*, except such testimony as may be given by him in the hearing upon objections to his discharge; . . .;" and excepting a prosecution for perjury in such testimony (*Cameron v. U. S.*, 231 U. S. 710, 58 L. Ed. 448). Therefore, said testimony is incompetent under Count I to prove that defendant concealed or aided and abetted his wife in concealing the car sold to Buscemi.[17]

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[16]*U. S. v. Yasser* (N. J. 1940), 114 F. 2d 558.

[17]11 *U. S. C. A.*, Sec. 25(a-10), Notes 61-73; *White v. U. S.* (Mass. 1929), 30 F. 2d 590; *Aronofsky v. Bostian* (Mo.), 133 F. 2d 290; *Bain v. U. S.* (Tenn. 1920), 262 Fed. 664; *In re Haley* (D. C. Cal.), 41 F. 2d 379; *U. S. v. Salih* (Mass.), 287 Fed. 763.

V.

There Is No Evidence to Support the Implied Finding of "Guilt" Under Count II That Defendant Wife Falsely Swore That She Owned No Interest in the Car in Her Bankruptcy Schedules "F" and "G". (Points on Appeal, 1, 5, 6, 7, 8.)

Count II of the indictment is not predicated upon defendant wife's ownership, but her "interest" in the car as of the filing of her schedules [Tr. 4] and it is not contended that she did not disclaim such interest in said schedules [Pltf. Ex. 4].

(1) From what has been said in Point III, *ante,* it would seem irrefutable that, as of bankruptcy, her sworn disavowal of ownership or interest was true.

(2) It need hardly be added that were there some secret investment of an interest in her in her sale to Buscemi, certainly his subsequent bona fide sale to a third party would estop her from asserting such claim (Point II (4) *ante*). But were there a doubt as to such estoppel, her appraisal thereof could not be better than a speculative "opinion" which, though erroneous, is not the subject of perjury[18] nor the evidence of *scienter* essential to the crime.[19]

(3) This criminal statute as to false oath creates no new crime, but merely a different penalty for perjury in bankruptcy matters[20] and requires the corroboration of one witness or additional evidence.[21]

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[18]*U. S. v. Margolis* (N. J. 1943), 138 F. 2d 1002; *In re Shoemaker* (D. C. Ind., 1868), F. C. #12799 (doubtful title); Point VI, N. 26, *post.*

[19]*Morris Plan Inv. Bank v. Henderson* (N. Y.), 131 F. 2d 975; *In re Peters* (N. Y.), 39 Fed. Supp. 38.

[20]*U. S. C.,* Sec. 52(b-2); *F. R. Cr. P.,* Rule 26; *Wechsler v. U. S.* (N. Y. 1907), 158 Fed. 579; *Hammer v. U. S.* (N. Y. 1925), 6 F. 2d 786.

[21]18 *U. S. C.,* Sec. 1621; *Khin v. U. S.* (N. J. 1931), 47 F. 2d 740; *U. S. v. Margolis, supra.*

VI.

(1) Count III Does Not Allege a False Oath; and

(2) The Testimony of Defendant, James A. Noell, in the Bankruptcy Court Respecting the Chevrolet Automobile Was Not Proven to Be False. (Points on Appeal, 7, 9.)

(1)

Insufficiency of Count III; Plain error unassigned.

Count III does not allege any testimony by the defendant in the Bankruptcy Court that constitutes the false oath charged, namely, that he gave the alleged testimony knowing that his wife "did have an interest in said 1941 Chevrolet Tudor Sedan automobile, and had not made a bona fide sale thereof to John Buscemi" [Tr. 7-8]. The indictment recites that he testified that "the car was sold to John Buscemi"; that it was owned by his wife and "clear" when sold for $800.00 odd; that he does not know but presumes that Buscemi, the owner, should have the pink slip; that defendant had the car in his possession about a week ago but "it was Mr. Buscemi's car. I had borrowed it from him. The title had been transferred and everything *so far as I know.*" The indictment shows that this testimony was all given at a hearing held on June 3. 1946, and from the page references quoted, it was apparently given at one sitting [Tr. 6-8].

There is a substantial variance in the testimony ascribed to defendant in Count III, as compared with the stenographic notes of the phonographic reporter read at the trial [R. T. (I) p. 54, line 17, to p. 60, line 14]. The last quotation in the indictment from the purported testimony in the Bankruptcy Court reads:

> "Q. (By Referee Brink.) All right, when was the last time you had the Chevrolet in your possession *or* when was the last time it was in Mrs. Noell's pos-

> session? A. (By Defendant James A. Noell.) It was in my possession about a week ago. But it was Mr. Buscemi's car. I had borrowed it from him. *The title had been transferred and everything so far as I know.*" [Tr. 7.]

As read by the reporter the italicized "or" was erroneously included and a comma in its stead omitted in the referee's question [R. T. 60:8-10]. On cross-examination [R. T. 60] he reiterated [60:13] that the answer was also misquoted [61:14-62:5]. The reporter's notes read:

> "Answer (By Mr. Noell). It was in my possession about a week ago. But it was Mr. Buscemi's car *then*. I had borrowed it from him, had the title transferred and everything so far as I know." [60:8-14; 61:12-62:5.]

Defendant was not asked if his wife had an interest in the car nor did he testify that she did not. It is not (and upon the record cannot be) claimed that, insofar as defendant knew, Buscemi did not receive the pink slip which is the indicia of title (Point III (p. 40), *ante*).

It is not alleged that title was not transferred "as far as I know," nor that defendant did not borrow the car from Buscemi.

(a) The charge is a *non sequitur*. His alleged knowledge that his wife had an interest in the car does not falsify his oath that Buscemi owned it, which is recognized under California Vehicle Code.[22]

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[22] *California Vehicle Code*, Sec. 186; *Civil Code*, Sec. 2981(2);
George v. Barnett, 65 Cal. App. 2d 828;
LeGrand v. Russell, 52 Cal. App. 2d 279;
Helmuth v. Frame, 46 Cal. App. 2d 372;
Coca-Cola Bottling Co. v. Feliciano, 32 Cal. App. 2d 351;
Bunch v. Kin, 2 Cal. App. 2d 81;
U. S. v. Schireson (3 Cir.), 116 F. 2d 881;
Point III (5), *ante*.

An oath is not false under 11 *U. S. C. A.,* Sec. 52(b) if the challenged testimony may be true or false.[23]

(b) Nor if qualified, as here, by the reservation "as far as I know," unless the latter is allegedly false.[24]

(c) Nor where the witness' entire testimony on the subject when construed together, as it fairly must be,[25] amounts to a mere opinion or conclusion.[26] As said in 41 *Am. Jur.* (Perjury), Sec. 6, p. 6:

> "It cannot be based on interpretations of alleged agreements, either oral or written, or upon opinions calling for the exercise of judgment, or upon statements as to the legal effect of certain facts. Hence, where a statement which is made the basis of an accusation of perjury is a matter of construction or deduction from given facts, there is no perjury even though the statement is erroneous or is not a correct construction or logical deduction from all the facts."

(2)

(a) The only evidence claimed to show the wife's interest is perjurer Buscemi's contradicted statement after the sale, that she could have the car if and when she wanted it. Were that a binding offer, and it is not, the wife never accepted it.

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[23]*People v. Woodcock,* 52 Cal. App. 412.

[24]*Morris Plan Inv. Bank v. Henderson* (N. Y.), 13 F. 2d 975; *In re Peters* (N. Y.), 39 Fed. Supp. 38.

[25]*U. S. v. Norris* (1936), 300 U. S. 564, 573, 81 L. Ed. 808, 813; *People v. Gillette,* 111 N. Y. Supp. 133; *Loubriel v. U. S.* (2 Cir. 1926), 9 F. 2d 807-8; dstg. *Ono v. Carr* (9 Cir.), 56 F. 2d 772, 774; *People v. Markham,* 206 N. Y. Supp. 197; *cf. Seymour v. U. S.* (8 Cir.), 77 F. 2d 577, 582.

[26]*Ex parte Ellis,* 3 Okla. Cr. R. 220, 105 Pac. 184, 25 L. R. A. (N. S.) 653; A. C. 1912-A, 863; *Schoenfelt v. State,* 56 Tex. Cr. R. 103, 119 S. W. 101, 22 L. R. A. (N. S.) 1216 (Note), 133 A. S. R. 956; *Lambert v. People,* 76 N. Y. 220, 32 A. R. 293; *cf. U. S. v. Margolis* (N. J.), 138 F. 2d 1002.

What has already been argued against either defendant's alleged concealment of the car under Count I (Points III, IV, *ante*), and against the wife's false oath in her schedule under Count II (Point V, *ante*), supports this defendant's contention that his oath was not false under Count III and needs no repetition. If his wife did not have a secret interest in the car, as of bankruptcy, after her sale to Buscemi, defendant did not falsify.

If she did have some unenforceable right or hope of reacquiring the car, his testimony that Buscemi owned the car would not be false because he did not volunteer what he was not asked.

No evidence in the case is material that is not within the calls of Count III, which specifically limits the issue to false testimony concerning *the wife's car,* not the husband's. As heretofore noted, the wife had no participation in anything concerning the car after the sale when Buscemi claims to have offered it back to him, and she did not accept it.

Perjurer Buscemi testified that, 3 days after his purchase, the husband brought an envelope to him, the contents of which he did not examine, and that the car was thereafter used in the former's taxi business by the husband and kept at the buyer's stand. There is no evidence that this was the wife's money, paid at her instance, nor that she was interested in Buscemi's taxi business or that the alleged money was delivered to Buscemi to repurchase the car.

It ought also be remembered that the evidence of the husband's use and activities concerning the car with Buscemi's permission after the former had given the interdicted testimony on June 3, 1946 [Tr. 6, 7], is not shown to have been authorized or participated in by de-

fendant wife. It is axiomatic that one person's rights cannot be disparaged, nor liabilities imputed to her by the conduct of another in the absence of agency. While her acts of ownership and possession after the alleged sale might raise a presumption against the latter, certainly the husband's independent conduct would not evidence the ultimate issue, namely, her interest, if any.

(b) The only corroboration concerning perjurer Buscemi's self-asserted statement to defendant wife is its inherent improbability and manifest falsity. At a time when cars of any vintage were at a high premium, it would hardly be expected that, after executing and completing a sale under a lawyer's guidance, and complying with the transfer requirements of the Vehicle Code, the buyer would immediately respond to the wife's lamentation over her lack of a car with any binding promise to restore his purchase. But whatever the probabilities, there is nothing in the alleged conversation which rises to the dignity of any contract whatever, independently of the formalities prescribed by the Statute of Frauds and Vehicle Code. There was no gift nor meeting of minds upon the terms of a re-sale.

This case demonstrates the wisdom of the rule requiring corroboration of a perjury charge.[27] It derives from the experience of ancients who ordained in the *Mosaic Code* a "diligent inquisition" and that not one, but three, witnesses were essential to establish a criminal charge.[28] "One witness shall not rise up against a man for any

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[27]18 *U. S. C.* 1621; 41 *Am. Jur.* 37; *Khin v. U. S.* (N. J.), 47 F. 2d 740; *U. S. v. Margolis* (N. J.), 138 F. 2d 1002.

[28]*Deut.* 17:6; *Heb.* 10:28; 2 *Cor.* 13:1; *Clark's Biblical Law,* Sec. 470.

iniquity or for any sin, in any sin that he sinneth; at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established." (*Deut.* 19:15.)

There certainly is no corroboration of perjurer Buscemi's testimony in the Department of Vehicle records of the sale to him and by him to Palm, nor in the open, notorious, continued possession, expensive repairs, painting and other acts of ownership by each buyer while he held title. Nor in Buscemi's receipt of damages for injuries to his car and the purchase money from Palm.

The circumstance that, having done work for and then working for perjurer Buscemi, and apparently being on friendly terms, the husband should have used the car intermittently, either about his work or for his personal needs, is of no significance whatever and is in any event irrelevant to any secret "interest" in the wife. The relationship of the two families at that time made such arrangement perfectly natural when the husband lacked and needed transportation.

In closing this subject, it should be added that the padding of an indictment with such baseless charges as those precipitated in Counts II and III penetrates the camouflage of mathematical smog and sound effect employed to simulate the equally groundless Count I. Aside from the hope that much artificial smoke will force several convictions whence the prosecutors can send a more lucious offering to the wardens, while preserving a double sentence in the form of a probationary term, there is first and primarily exposed in such dragnet practice the tactics of mesmerizing the jury with the heresy that faithful public servants would not give currency to any charge were it unjustified by the mysterious laboratory tests of bureaucratic omniscience. Once this heresy termites

mental integrity, a jury's susceptability to more of the same stimulant is increased with each additional false count. It is the same vicious practice indulged to the low plane of pettifoggery in universal conspiracy charges which has again invited the rebuke of the Supreme Court (*Krulewitch v. U. S.* (1949), Adv. Op. 93 L. Ed. 623, 627). Justice, as of old, demands a more "diligent inquisition."

VII.

It Was Prejudicial Error for the Court (1) to Permit Witness Kirk to Expose to the View of the Jury the Enlarged Charts of His Summary of Defendants' Accounts and His Opinions, Until Said Charts Were Received in Evidence; and (2) in Denying Defendants' Motion to Strike the Summary of Said Witness as Admittedly Incomplete and Inaccurate; and (3) in Admitting Said Charts in Evidence. (Points on Appeal, 10, 15.)

Statement of Record.

From the preceding Statement of Facts (Appendix, p. 1, *et seq.*), and Point I, *ante,* it appears that the jury were denied knowledge of the voluminous documentary evidence which plaintiff relied upon in an attempt to show that the difference between the cash income and outlays of defendants resulted in a substantial balance, which they had not surrendered to the receiver. F. B. I. accountant Kirk was permitted to expound his summary of such parts of said evidence as he deemed pertinent and to advertise to the jury before his summary was received three large charts depicting his handiwork. Plaintiff's Exhibit "40" for Identification (never received in evidence) is a summary of the bankruptcy schedules [Exs. 4, 4-A, 4-B, 4-C, 4-D] which are inadmissible in evidence [R. T. 163-6].

Plaintiff's Exhibit "57" is an alleged summary of the partnership business [R. T. 291-5]. Plaintiff's Exhibit "58" is an alleged summary of cash receipts by partnership and defendants, disbursements and balances [R. T. 296-7]. Over defendants' objection, the Court directed the bailiff to "provide an easel or some mechanism upon which it can be arranged so all of us can see it." When the props were set and visibility tests made, Mr. Kirk occupied the stage for several days [R. T. 293].

Appellants do not content that it is improper to use the evidence of an expert to summarize *all* the items of such accounts and state the results of the jury, nor to thereafter illustrate the same by the use of charts. If plaintiff had confined itself to that course in this case, there would have been no objection. Of course, before such expedients can be resorted to in any case, the proper foundation must be laid by the introduction of competent evidence that is material or relevant to the issue.[1] The jury, who were not bound by the conclusions and opinions of an expert, were obliged to weigh such foundational evidence and reach their own conclusions.[2]

In this case, the exact reverse of the proper procedure occurred. Not only were the jury ignorant of the foundational evidence (*Point I, ante*), but before the qualifications and competency of witness Kirk were established by way of showing his familarity with the accounts of defendants, he was permitted, over defendants' objections, to attach said charts to the blackboard and expose

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[1]*Stephens v. U. S.* (9 Cir.), 41 F. 2d 440; *U. S. v. Weinbien* (2 Cir.), 121 F. 2d 826; Note 6, *post.*

[2]*F. R. Cr. P.*, Rule 28; *Head v. Hargrave*, 105 U. S. 45, 26 L. Ed. 1028; *The Conqueror*, 166 U. S. 110, 41 L. Ed. 937; *McGowan P. T. B. Co. v. Amession*, 121 U. S. 585, 30 L. Ed. 1027.

the same to the jury, where they remained throughout his testimony and the trial and during recesses for the edification of prowling curiosity [Pltf. Exs. 40, 57, 58, R. T. 282-95; 297-6, 708, 729-732].

It will be recalled from *Point II, ante,* that defendants, husband and wife, comprised a business partnership whose assets consisted of defendants' community property and certain cash advances from the sale of her separate real estate by defendant wife to buy materials and supplies and pay operating expenses and debts. It does not appear that defendant husband owned any separate estate.

The partnership commenced in October, 1945, and ceased operations about May 22, 1946. Its records consisted of ledger, journal, cash book, check books, files and numerous memoranda of refunds to purchasers of houses whose orders could not be filled because of the lumber shortage. None of these books were posted to May 22, 1946, and in several instances not for several months before bankruptcy. No lumber purchases were entered after March 27th and no sales after February 28th, though there is other evidence thereof. The last cash receipt entry is April 17th [R. T. 249-50, 745-58, 791].

The partnership was insolvent from March, 1946, except for the cash advances by Mrs. Noell from the sale of her separate real estate. There were no books of account introduced concerning her separate estate and the information about said sales and advances was derived from escrows, bank records and the partnership books.

Witness Kirk had access to the account of assets [R. T. 173] and business records [R. T. 182] surrendered to

the bankruptcy receiver by defendants. After relating his examinations of the foregoing, which he assertedly summarized upon said sheets [Exs. 40, 57, 58], he admitted that, in charging defendants *jointly* with $32,011.67 as unaccounted for, he lumped all income of the partnership and of each individual defendant regardless of its partnership, community or separate property character [*Point II, ante;* R. T. 263, 733-64, 769].

He admitted that his summary charts and opinions were confined to said incomplete records and excluded other large financial transactions of which he was informed before testifying [R. T. 162-5, 193, 203, 219, 237-49, 252-323, 659-764, 769-899]. He was permitted to charge defendants personally with all cash withdrawals for which he could not find a book entry that satisfied him otherwise, and the chart, Exhibit 57, was so prepared [R. T. 264-74, 282-95, 312, 664-9].

Thus, Exhibit 57 charges defendants jointly with the receipt of $16,636.58 from the sales of Mrs. Noell's separate property [R. T. 888-9] to make up the total of $32,011.67 which the witness was permitted to opine *they* had not accounted for (and, therefore, concealed from the receiver several months later!). Deduct her separate receipts from said balance and the remander chargeable to both defendants is $15,385.09. But that is not all.

In the bankruptcy schedules [Ex. 4] the partnership listed $15,000.00 as owing from Schueles for undelivered lumber for which they had deposited said sum with him. Expert Kirk admitted that he erred in charging

that item to defendants as receipts unaccounted for [R. T. 865-72]. Deduct that from the preceding balance of $15,375.09, and the remainder is $375.09.

Regarding Count I as a joint charge of concealment of funds, the foregoing trifle is immaterial and irrelevant when it is considered that defendants had to live for several months.

But appellants are here challenging the admissibility of expert evidence; return to the Schueles mistake of $15,000.00 and deducting it from the $32,011.67, find a balance of $17,011.67, which the expert says was unaccounted for. However, he therein charged as receipts unaccounted for the proceeds of checks, cashed by one or the other defendants *individually,* bearing notations "for lumber," "lumber yard," etc., for $4,000.00, $2,500.00, $1,500.00, or $8,000.00, leaving a balance of $9,011.67. The balance is comprised of cash withdrawals by one or the other defendant with no notation on the check indicating its purpose [R. T. 872-87]. However, the partnership was doing business, buying materials and making refunds during all that period, as shown in *Point II, ante.*

Despite these foundational errors and deficiencies, the expert was permitted to reflect the same in his opinion as cash unaccounted for by defendants (jointly) and to embalm his fallacies in the jury's mind with the charts and scrolls. The jury did not comprehend the voluminous exhibits without which the passing allusions thereto as the same were identified or referred to by number were mean-

ingless. Plaintiff's case was presented to stand or fall upon the exhibition by witness Kirk. Appellants' grievances go to the heart of his showing. The resultant prejudice from error of that magnitude is inescapable (*Points I, ante; XI, post*).

Argument and Authorities.

(1) It was prejudicial error in the circumstances of this case for the Court to permit the display of said charts before the jury until the competency of the witness and the accuracy of his summary reproduced upon said charts was established and the same were received in evidence.[3]

(2) The rule permitting an expert to analyze and summarize involved accounts is an exception to the fundamental principle of evidence that a witness may only testify to those things that are within his personal knowledge. The exception exists to facilitate the discovery of truth rather than to confuse or prejudice it.[4]

Where, as here, there are substantial items of account which, for one reason or another, are omitted from the items analyzed and calculated by the witness, or where items chargeable severally are charged to both, it is obvious that his conclusion as to the financial status of said defendants at the critical time is worse than worthless.

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[3]*Note 1, ante; Tunmore v. McLeish,* 45 Cal. App. 266; *Thral v. Smiley,* 9 Cal. 520; *cf. Lisenba v. California* (1941), 314 U. S. 219, 86 L. Ed. 166, 176; *People v. Kynette,* 15 Cal. 2d 731, 755; *San Mateo v. Christin,* 22 Cal. App. 2d 375.

[4]*Notes 1, ante; 6, post.*

The ultimate question was, whether or not defendants concealed cash from the receiver, the answer to which depended upon plaintiff showing, not merely that they had received, but, also, that they had not expended the cash which they did receive. Expenses were just as important as receipts. Moreover, under a charge of joint concealment, where no conspiracy is alleged, the only relevant opinion the expert could give concerning unaccounted for cash is confined to what was jointly received or jointly controlled and excludes separate receipts by either defendant. This is not a situation such as arises where an expert opinion is admissible upon a certain hypothesis which does not necessarily embrace all of the evidence in the case.[5] But, in any case, it is prejudicial error to admit the conclusion and opinion of an expert which includes, omits or disregards facts and evidence which are part of the premise whence his deduction is necessarily drawn.[6] It was error to overrule the objections and deny the motion of defendants to strike the conclusion of witness Kirk as to the cash balance unaccounted for by defendants when such conclusion was not confined to all pertinent facts [R. T. 663-733 (objection), 793, 843-6, 856-7 (motion), 868-89].[7]

(3) For the reasons last stated it was likewise error to overrule defendants' objections to the introduction of said charts in evidence [R. T. (III) 729-33].

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[5]*Treadwell v. Nickel,* 194 Cal. 243, 267.

[6]*Note 1, ante; Citron v. Fields,* 30 Cal. App. 2d 51; *Bickford v. Lawson,* 27 Cal. App. 2d 416, 428; *Roberts v. Eldred,* 73 Cal. 394; *Lewy v. U. S.* (5 Cir.), 29 F. 2d 462, 62 A. L. R. 388; *Wigmore, Evid.,* Sec. 1230; 32 *C. J. S.* (Evid.), Secs. 475, 551-3; 22 *C. J.,* p. 708 (N. 27); *Chamberlayne, Trial Evid.,* Secs. 924, 1012, 1014; *Anno.* 52 *A. L. R.* 1268; 66 *A. L. R.* 1206, 81 *A. L. R.* 1431.

[7]*Note 6, ante.*

VIII.

The Court Prejudicially Erred in Receiving Evidence of a Returned Envelope Addressed to Scheules and the Testimony of the Postmaster to Show That the Former Was Not at the Place Previously Indicated by Defendant James A. Noell. (Points on Appeal, 11, 12.)

Statement of Record.

The amended partnership bankruptcy schedules (B-3) listed an item of $15,000.00 paid in Monrovia by defendants to purchase lumber from one Schueles in Roseberg, Oregon, in April, 1946 [Pltf. Ex. 4]. Witness Cheek, bankruptcy trustee, admitted that defendant James A. Noell had informed him, while investigating said matter, that said money had been expended without receipt or record. There was no proof to the contrary, and abundant evidence that defendants not only had sufficient funds therefor, and, as was customary in the days of the lumber shortage, they were obliged to resort to any source of supply they could find and upon the terms exacted by those who sold it [Pltf. Exs. 57, 58]. However, there was no evidence that either defendant ever claimed that Scheules resided or was in Roseberg or at any other location after the transaction in Monrovia alluded to by the husband.

Notwithstanding, plaintiff was permitted to show, as a part of its case in chief, that an envelope addressed by the bankruptcy trustee about July 12, 1946, to Schueles, Roseberg, Oregon, months after the time referred to by the husband, was returned undelivered by the post office. Thereupon, defendant husband offered to accompany the trustee to find Schueles, but the offer was declined [Pltf. Ex. 49, R. T. 186-8, 215-18, 230-2, 697-8]. In addition, plaintiff was permitted to show by the postmaster (Wim-

berly) from Roseberg that he was unacquainted with, and months after the Scheules transaction he made inquiry for Schueles in Roseberg and did not locate him [R. T. (II) 354-60].

Argument and Authorities.

(1) Proof of the mailing of a letter duly addressed, with postage prepaid, raises a disputable presumption that it was delivered, but if the letter is returned in the mail to the sender it proves merely two facts, neither of which is relevant to this inquiry, namely, first, that the mail was not delivered to the addressee, and, second, that it was returned to the sender. There certainly is no presumption or inference from the latter circumstance that the addressee was not in the locality of the postoffice to which the said letter was addressed, and, much less so, that he was not there several months before or afterwards. No presumption of continuance runs "backward."[1]

(2) The postmaster's testimony was inadmissible for several reasons. First, he admitted merely a cursory inquiry, which in itself denied that Scheules could not then be found in Roseberg. Second, his inquiry was made months after the Schueles transaction and could not possibly reflect upon the question whether James A. Noell met him in Monrovia, California, when he stated he did. There is no presumption of continued presence in a certain locality and negative evidence is only admissible where the witness was in a position to have observed the critical fact.[2]

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[1]31 *C. J. S.* (Evid.), Secs. 140, 141, 136; *Liverpool L. & G. Co. v. Nebraska S. W.* (Neb.), 96 F. 2d 30; *F. W. Woolworth Co. v. Seckinger* (La.), 125 F. 2d 97; *U. S. v. One 1939 Truck etc.*, 35 F. 2d 905; *cf. Chamberlayne, Trial Evid.*, Secs. 420, 425, 136, 138, 139.

[2]31 *C. J. S.* (Evid.), Sec. 124; *Edwards v. California*, 314 U. S. 160, 173, 86 L. Ed. 119, 125; *Kansas City Life Ins. Co. v. Fox* (Tenn.), 104 F. 2d 321.

IX.

It Was Improper Cross-Examination and Prejudicial Misconduct for the Government to Inquire of Defendant, James A. Noell, Concerning a Black Market Purchase Not Elicited on Direct Examination and Prejudicial Error for the Trial Court to Explore and Exploit Defendant's Privilege of Declining to Answer Upon the Ground of Self-Incrimination Before the Jury. (Points on Appeal, 13, 14, 15, 18.)

Each defendant testified for the defense, described their business operations, property and accounts, and disclaimed withholding any assets from the Bankrupcty Court. Neither of them was asked or testified concerning any "black market" purchases of lumber for their partnership [R. T. (IV) 1062, 1090, (V) 1118, 1174, 1217, *et seq.*]. Notwithstanding, on cross-examination, the Government undertook to elicit testimony from James A. Noell that he had engaged in such transaction, and expended $15,-000.00 therein for which his books did not account—a fact which would eliminate over one-half of the concealment charged by the Government [R. T. (V) 1217-1225]

"Cross-Examination.

By Mr. Zack:

Q. Mr. Noell, when did you give $15,000 to William Scheules?

Mr. Rose: Just a moment. I object to the form of the question as argumentative.

The Court: Sustained.

Q. By Mr. Zack: Did you give $15,000 to William Scheules?

Mr. Rose: I object to the form of the question as not within the scope of the direct examination and I

assign the repeated questioning along those lines as prejudicial and improper.*

The Court: Overruled. You asked him if he had given any property or money to anyone to hold for him or otherwise.

Mr. Rose: Yes.

The Court: He may cross-examine on that.

Mr. Rose: I asked if they held it for him. I said, 'other than has been reported in your petition and amended schedules.' That was the form of my question.*

The Court: He may cross-examine on that. Objection overruled.

Mr. Zack: Will you read the question?

(Question read as follows:

'Q. Did you give $15,000 to William Scheules?')

The Witness: *I wish to stand on my Constitutional rights.*

The Court: What do you mean by that?

The Witness: It was a black market deal and *any testimony I give may tend to incriminate me.***

The Court: Please read the question, Mr. Reporter.

(Question read as follows:

'Q. Did you give $15,000 to William Scheules?')

The Court: You say the answer to that question would tend to incriminate you?

The Witness: It may tend to incriminate me.

Mr. Rose: I have no objection to his answering the question. I want you to know what I am objecting to. I am objecting to his singling out this matter under cross-examination. It is not a matter

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*R. T. (V) 1216:22-1217:1 (direct examination).

**That should have halted further inquiry in the jury's presence.

that I made inquiry into. I have restricted my inquiry.

The Court: I understand your objection but you asked if anyone was holding any property.

Mr. Rose: Other than he has reported.

The Court: That is a broad question.

Mr. Rose: That has not been reported to the bankruptcy court.

The Court: Well, the witness is asserting his Constitutional privilege against self-incrimination. Now, do you mean by that that you would be incriminated in a matter other than this proceeding?

The Witness: It is possible, sir; it is possible.

Mr. Rose: I haven't any objection to him answering the question as to whether he did pay over the money, but the witness in response to an inquiry of Your Honor's has interjected a collateral matter that is not herein involved.

The Court: I will instruct you to answer that question. Do you understand the question?

The Witness: I do, yes. In the course of my business it was very necessary—

The Court: The question is, did you do that?

The Witness: I did, yes, sir. Not $15,000, but $17,000.

Q. By Mr. Zack: When was that? A. Again, must I answer that?

The Court: I instruct you to answer that question.

The Witness: $2,000 in February.

The Court: What year?

The Witness: 1946. $15,000 the last part of April, 1946.

Q. By Mr. Zack: In what form was it? A. It was cash. I was compelled to.

Mr. Rose: Just a second. You were just asked what form it was in.

Q. By Mr. Zack: Where is William Scheules now? A. I don't know.

Q. When was the last time you heard from him? A. Directly?

Q. Yes. A. At the time I gave the money, the $15,000 to him.

Q. Where did you give him the money? A. At our place of business, 128 and 124 West Pomona, Monrovia.

Q. Where did you have the money?

Mr. Rose: Object to it as immaterial.

The Court: Overruled.

The Witness: I had it on my person and I had some of it there at the place of business.

Q. By Mr. Zack: How much did you have on your person? A. I couldn't tell you that.

Q. How much did you have at the place of business? A. I couldn't tell you exactly that. All I know is, I had it.

Q. Where were you keeping it at the place of business? A. In a little room that we termed the office. We had just moved down there. We had just purchased the property and built a $1,788.00 fence. We spent about five or six thousand dollars fixing the lumber yard up, but we hadn't as yet finished our office, so we were using a room what originally was a feed room on a chicken and turkey ranch. That is what it was when we bought it. We were using that as a temporary office. That is where I had it hid—that is, part of it.

Q. Was anybody living there? A. I was out there.

Q. You were living there at the time? A. No. It was there part of the time when I wasn't there, but only for a day or so or three.

Q. Where did you get the $15,000? A. Miscellaneous checks that had been cashed from the proceeds of Mrs. Noell's real estate. $7,399.00 from one piece of property. There was $6,497.00 from another piece of property. There was $2,300 and some odd of another piece of property, and I think there was some more, too.

Q. Did Mr. Scheules give you a receipt for the money? A. A receipt was left with Mrs. Noell.

Q. Did you— A. Wait a minute. By me. I didn't know that there was a receipt.

Mr. Rose: Just a second, Mr. Noell. I am advising you as your counsel and I am taking objection to this form of inquiry and I am directing you as your attorney to respond only to questions that the court directs you to answer.

The Witness: All right.

Mr. Rose: I have some legal views on the subject and don't go beyond answering any question unless His Honor directs you to do so.

Q. By Mr. Zack: Did Mr. Scheules give you a receipt for the money? A. He did not give me a receipt.

Q. Were there any checks involved? A. No checks at all, sir.

Q. What did you give him the money for?

Mr. Rose: I object to that, Your Honor, on the ground it is not within the scope of the direct examination.

The Court: The witness claims his Constitutional privilege. I sustain the objection as to what the transaction was.

Mr. Zack: No further questions.

The Court: Do you claim your Constitutional privilege against self-incrimination? That is to say, you state on your oath under which you are now, that the answer to that question would tend to incriminate you in some other connection than this proceeding?

The Witness: What was the question? May I have it?

The Court: Read the question.

(Question read as follows:

'What did you give him the money for?')

The Witness: I don't mind answering it.

Mr. Rose: As long as it has reached that stage, Your Honor has permitted this inquiry and I might as well permit him to answer the question subject to my objection.

The Witness: That is what I say. I want to answer it if I may.

The Court: It is a Constitutional privilege and the witness says that an answer to the question would tend to incriminate him in some other connection than this proceeding.

Mr. Rose: He interjected. It was a black market deal. That is in the record. That is before the court and jury.

The Court: I will sustain his claim of Constitutional immunity if he wishes to stand upon it.

The Witness: I don't, sir. I would rather answer the question.

The Court: Very well.

Mr. Zack: If Your Honor please, I want to go into it fully.

The Court: If it is opened up at all it will be open to the fullest extent.

Mr. Zack: May I resume my cross-examination then, Your Honor?

The Court: You understand you are waiving your Constitutional privilege by the attitude you are taking now?

The Witness: I wished to not answer the questions in the first place, but I was forced to.

The Court: On your statement that the nature of the transaction and the details of it might tend to incriminate you in some other proceeding, I am prepared to sustain your claim of privilege to answer.

Mr. Rose: As his counsel I am advising him to answer.

The Court: Please, Mr. Rose, until I finish.

Mr. Rose: Pardon me.

The Court: I want the witness to understand that fully.

The Witness: I do, sir.

The Court: Now, if you wish to waive your Constitutional privilege against self-incrimination you may do so, but I want you to do so with complete undertsanding.

The Witness: I realize that.

The Court: Up to this point nothing has been said about what kind of transaction it was; no inquiry has been made as to what kind of transaction it was.

The Witness: Well, I have told you—

Mr. Rose: Just a second. Do you wish to waive or stand upon your Constitutional privilege?

The Witness: I would prefer, yes, sir. I wanted to in the first place.

Mr. Zack: No further questions.

Mr. Rose: Step down, sir.

The Court: Next witness.

Mr. Rose: The defendants rest, Your Honor."

Argument and Authorities.

(1) Common law rules of evidence govern a federal criminal trial, except as superseded by Congress or the Supreme Court (18 *U. S. C.,* Sec. 3771; *F. R. Cr. P.,* Rule 26).

(2) It was not only improper cross-examination, as beyond the scope of the witness's direct examination,[1] but prejudicial misconduct for the prosecutor to explore an extraneous subject for no other purpose than demeaning defendants before the jury as criminal black-marketeers. Plaintiff's case in chief has been sustained with the denial of defendants' motion for acquittal [R. T. 934]. While evidence of a crime not on trial may be admissible where the facts thereof are within the issue under investigation (*Todorow v. U. S.* (9 Cir.), 173 F. 2d 439, 447 (N. 15)), or to prove knowledge, motive, intent, scheme, etc. (*Tedescon v. U. S.* (9 Cir.), 118 F. 2d 737, 739-41), those exceptions (*Smith v. U. S.* (9 Cir.), 173 F. 2d 181, 184) are strictly confined to their objectives and do not justify a dragnet to impugn an accused before a jury other than as the admissible evidence of the charge on trial does so.[2]

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[1] *U. S. v. Toner* (3 Cir. '49), 173 F. 2d 140, 144 (quoted *post*);
Northern P. R. Co. v. Urlin, 158 U. S. 271, 39 L. Ed. 977;
Howard v. Comm., 25 Ky. L. R. 2213, 200 U. S. 164;
Cf. Heard v. U. S., 255 Fed. 829.

[2] *Boyd v. U. S.,* 142 U. S. 454, 35 L. Ed. 1077;
Hall v. U. S., 150 U. S. 76, 37 L. Ed. 1003;
Manning v. U. S., 287 Fed. 800;
Pierce v. U. S., 86 F. 2d 949;
Gart v. U. S., 294 Fed. 66;
Farkas v. U. S., 2 F. 2d 644;
Weil v. U. S., 2 F. 2d 145.

It was as much the prosecutor's "duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." "Foul blows" are never just ones (*Vierick v. U. S.,* 318 U. S. 236).

The prejudicial effect of the inquiry was not destroyed by the refusal of the witness to answer the prosecutor who is deemed not to have asked the question without information that the witness was guilty (*Pierce v. U. S., supra*).

Prejudice is presumed from such misconduct (*Berger v. U. S.,* 295 U. S. 78, 84, 79 L. Ed. 1314); and as held in *Krulewitch v. U. S.* (Mar. 28, 1949), 93 L. Ed. (Adv. Op.) 624, 627:

> "In *Kotteakos v. United States,* 328 U. S. 750, 90 L. ed. 1557, 66 S. Ct. 1239, we said that error should not be held harmless under the harmless error statute (28 U. S. C. A., §391; F. R. Cr. P., Rule 52(a)) if upon consideration of the record the court is left in *grave doubt* as to whether the error had substantial influence in bringing about a verdict."

Jackson, J., concurringly added (93 L. Ed. 631):

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury, *cf.* Blumenthal v. United States, 332 U. S. 539, 559, 92 L. ed. 154, 169, 68 S. Ct. 248, *all practicing lawyers know to be unmitigated fiction.* See Skidmore v. Baltimore & O. R. Co. (C. C. A. 2d N. Y.), 167 F. (2d) 54."

(3) Defendant, as a party, lost none of his privileges as a witness (18 *U. S. C.,* Sec. 3481). Indubitable was his right under the Fifth Amendment, following the com-

mon law, to decline to answer any question which might incriminate him in another matter, *i.e.,* buying "black market" lumber in violation of the Emergency Price Control Act of 1942, as amended (Secs. 202, 204, 205, 50 U. S. C. A. Appx., Secs. 902(a), 904, 925(b), 18 U. S. C., Sec. 88).[3]

In *U. S. v. Toner* (3 Cir. '49), 173 F. 2d 140, 143-4, the cross-examination by defendant of a prosecution witness was halted upon the latter's claim of the privilege. In overruling the defense contention on appeal that the right of cross-examination was denied, the Court held (144):

> (1) "Questions where the witness was protected in refusing to answer were related to matters remote from the subject matter of this prosecution. . . . *The questions had no relevance to the subject matter testified to by the witness on direct examination.* Counsel pressed upon the court the point that he was entitled to go into collateral matters to test credibility. The court replied that the matters inquired into were too remote. . . . We think his rulings here might well be sustained on this ground without any

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[3]18 *U. S. C.,* Sec. 3482;
Blumenthal v. U. S. (9 Cir.), 158 Fed. 883, 331 U. S. 799;
Quirk v. U. S., 161 F. 2d 138;
18*U. S. C.,* Sec. 3482;
Counselman v. Hitchcock (1892), 142 U. S. 547, 562;
Chamberlayne, Trial Evidence, Sec. 259;
Anno. 27 *A. L. R.* 135;
8 *Wigmore, Evid.* (3 Ed. 1940), Sec. 2250 *et seq.*

reference to the privilege of self-incrimination at all. . . ."

(2) "The rulings were right with respect to self-incrimination. No one disputes the existence of the privilege of a witness to be protected against giving answers which will incriminate or degrade him. The privilege can be waived. The problem of waiver may become difficult. But there is no waiver here. This witness could not have refused to answer questions which did not incriminate him, and the questions asked in direct examination did not. He was entitled, therefore, to set up his privilege when the occasion arose. And he did."

The guarantee is not waived by the bankrupt's being required to surrender his records to the receiver or to file schedules, nor can his exercise of such privilege be construed against him.[4]

In re Bowman (1930), 105 Cal. App. 37, 44, quotes the federal rule:

"When a question is propounded, it belongs to the court to consider and decide whether any direct answer to it can implicate the witness. If this be de-

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[4]*Re Harris* (1911), 221 U. S. 274, 279;
Arndstein v. McCarthy (1920), 254 U. S. 71;
McCarthy v. Arndstein (1923), 262 U. S. 355;
Boyd v. U. S. (1886), 116 U. S. 616;
Brown v. U. S. (1928), 276 U. S. 134;
Mulloney v. U. S. (1935), 79 F. 2d 566;
U. S. v. St. Piere (2 Cir.), 132 F. 2d 837, 147 A. L. R. 240;
8 *Wigmore, Evid.,* Sec. 2276.

> cided in the negative, then he may answer it without violating the privilege. . . . If a direct answer may incriminate himself, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of his privilege. . . . it follows . . . that if the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not."

(4) Defense counsel on direct meticulously avoided inquiry as to the Schueles transaction, and when cross-examination was attempted and erroneously permitted, he sought to keep the self-incrimination issue from the jury by insisting upon his original objection, which was again overruled. In erroneously overruling defendants' objection to the cross-question, the Court forced him into the hapless position of either waiving his privilege and confessing a collateral crime, or of declining to answer upon the ground of self-incrimination; and, in either event, of disparaging himself and the defense of both defendants before the jury perforce a prosecution tactic, enlarged by the trial court, which should never have been indulged in. The effect was to deny the guarantee against self-incrimination. (*Pierce v. U. S., supra.*)

There was only one means to minimize the damage when the Court's attention was early called to the constitutional privilege. The witness had not then committed himself because of the intervention of his counsel's objection. Immediately upon the involvment of the privilege being indicated, the Court should have excused the jury and in their absence have explained the witness's right, the consequence of its waiver, and ascertained the latter's election.

> "A wise judge will make the inquiry in such a way as to protect the witness, and the authorities insist that it is his duty so to do." (*Chamberlayne, Trial Evidence,* Sec. 262.)

Instead of exercising the only precaution available to avert the prejudicial dilemma which ensued, the trial judge proceeded to canvas the subject in painful detail. However unwitting and well intentioned the trial judge, the inescapable effect of the inquisition was to impress upon the jury the damaging fact that a defendant on trial for concealing assets and false swearing, and the husband of his co-defendant, had theretofore been implicated in a $15,000.00 transaction which he dare not testify about lest he confess another felony! *And that was the last word heard by the jury from the witness box!*

If the learned trial judge was too dubious of the disastrous consequences to have then declared a mistrial, or to have admonished the jury to disregard the colloquy, we may wonder how he could have been so oblivious of the course of the virus when, after 12 days of trial, the jury

returned verdicts of guilty in *one hour and 25 minutes* [Tr. 14] in ignorance of the contents of 150 exhibits as to have denied a new trial [Tr. 18, 20, 21].

It is the constitutional duty of any Federal Court, *nisi prius,* or appellate, to so exercise the judicial process that all the fundamental rights of the accused, including those of a fair trial and protection against a self-incrimination, are effectuated. It is not a question of forms, styles, or even immemorial customs, but whether or not what was done impaired a fundamental right or imposed a burden upon the accused to the detriment of his defense, which a reasonable, impartial administration of justice neither requires nor condones.[5]

And, as was recently held in *U. S. v. Kobli* (3 Cir. 1949), 172 F. 2d 919, 921:

> "At the outset we note that it is not necessary for the appellants to show that she was in fact prejudiced by the action of the trial judge. If that action violated her constitutional right we agree with the Court of Appeals of the Eigth and Ninth Circuits that a 'violation of the constitutional right necessarily implies prejudice and more than that need not appear. Furthermore, it would be difficult, if not impossible, in such cases for a defendant to point to any definite personal injury. To require him to do so would im-

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[5]*Ashcraft v. Tennessee,* 322 U. S. 143;
Powell v. Alabama, 287 U. S. 45;
Glasser v. U. S., 315 U. S. 60.

pair or destroy the safeguard.'" (Cit. *Davis v. U. S.* (8 Cir.), 247 Fed. 394, 398-9, L. R. A. 1918C, 1164; *Tanklay v. U. S.* (9 Cir.), 145 F. 2d 58, 59, 156 A. L. R. 257.)

While the foregoing involved the denial of the guarantee of a public trial under the Sixth Amendment, there is no difficulty in discerning prejudice from the violation of the coeval guarantee against self-incrimination under the Fifth.

Even where the error was not called to the trial court's attention to normally exclude its consideration on appeal, this Court has recently said (*Smith v. U. S.* (9 Cir. 1949), 173 F. 2d 181, 184:

> "However, an exception exists in criminal cases where the alleged error would result in a manifest miscarriage of justice, or would seriously affect the fairness, integrity, or public reputation of judicial proceedings. The appellate tribunal will examine the record sufficiently to determine whether such has occurred." (See citations.)[6]

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[6]*Accord:* Rule 5(b); *Giles v. U. S.* (9 Cir.), 144 F. 2d 860; *Todorow v. U. S.* (9 Cir.), 173 F. 2d 439.

X.

Judgments of Imprisonment Imposed Upon Defendants Upon the Recommendation of the Prosecutor's "Committee" to the Trial Judge Are Denials of Due Process of Law. (Points on Appeal, 1, 7.)

June 18, 1948, defendants were convicted, both causes were referred to the probation officer and continued to July 12, 1948, when sentences were pronounced and judgments entered [Tr. 13, 14, 22] after defendants' several motions for acquittal and new trial were denied [Tr. 17-21]. Defense counsel argued said motions at length [R. T. 1274] and each defendant made a statement reiterating his and her innocence to the Court [R. T. 1305], when the following transpired [R. T. (V) 1315:22-1316:11):

"The Court: What does the Government recommend?

Mr. Zack: The Government recommends three years confinement as to each defendant.

The Court: What fine does the Government recommend?

Mr. Zack: No fine, your Honor.

The Court: I don't think I understand your statement.

Mr. Zack: *The recommendation of the committee that considered these matters was three years confinement as to each defendant but no fine.*

The Court: Is it the theory of the Government that all this money that was concealed has now been spent?

Mr. Zack: We don't know where it is, your Honor. We haven't been able through the investigation that has been carried on to come to any clues. We have some, but they are not the type that were admissible in evidence."

After discussion with counsel wherein the Court obviously concluded that defendants concealed $32,011.66 from the bankruptcy receiver on May 22, 1946 (Count I) because Kirk said they had it months before, sentences of three years each and a payment of a $5,000.00 fine by each defendant as a condition of probation was imposed [R. T. 1321 *et seq.*].

Argument and Authorities.

Who was this "Committee," lurking furtively in the shadows with the prosecutor as its mouth-piece? It was no person or group ordained by law or before whom defendants were accorded a hearing ere it memoralized its momentous recommendation. But as a "Committee" is always derivative, it must have been at large before its fiat of three years imprisonment, which exactly coincided with that of the judge's whose pronouncement was not uttered until the former's was officially recorded. If it does not appear that the "Committee" effected the part of the good women who appeared at the sepulchre to claim the Master's body they missed none of their cue from the preceding scene when demand was made of Pilate that he "crucify him." What followed in each case speaks for itself. If the judge would not absolve defendants, the "Committee" confessed their inability after two years of frantic search to find any part of the subject of the alleged cash concealment.

The rules require that sentence be imposed and the judgment signed by the judge and entered by the clerk after pre-sentence investigation by the probation officer (*F. R. Cr. P.* Rule 32). Probation officers are appointed by and responsible to the court, and to no one else (18 *U. S. C.* Sec. 3654). While their pre-sentence reports should, and customarily do, reflect upon the qualifications

of a defendant for probation, there is no authority in any law for any judge to entertain a "recommendation" by any "Committee" from any source, and especially not from the office of the accused's prosecutors, concerning the sentence to be imposed, as was done below. Judge Lynne for the Northern District of Alabama in *U. S. v. Christakos* (Apr. 6, 1949), 83 Fed. Supp. 521, 525, recently made some wholesome observations in ruling upon motions to vacate sentences:

> "There is something essentially incongruous in a judge's arrogation of the office of an attorney in relation to the accused. He is not entitled to information relating to the social and economic background of a defendant, including his prior criminal record, if any, as disclosed by the report of presentence investigation, until after a plea of guilty has been received. It is fair to assume that this safeguard was inserted in the criminal rules (*F. R. Cr. P.,* Rule 32(c) to insure the fact, as well as the appearance, *that the judge is an arbiter and not an arm of the prosecution.*"

Congress may have plenary power to prescribe the jurisdiction of the District Courts of the United States (*U. S. Const.,* Art. I (8-(9, 18); 18 *U. S. C.* 3231) and to delineate the administrative functions and increase the duties of the Attorney General (*U. S. Const.,* Art. I (8-(9, 18))[1] whose executive office, however, has no constitutional prerogative for abridging the independence of the

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[1] *Shoemaker v. U. S.* (1893), 147 U. S. 282, 301.

judiciary (*Ibid.,* Art. II (1, 2); Arts. III, VI). The executive's duty to "take care that the laws be faithfully executed" (*Ibid.,* Art. II, Sec. 3) does not clothe "the President with a power entirely to control the legislation of Congress, and paralyze the administration of justice," nor to deny or impede due process of law.[2]

The grant of power to Congress (Art. III, Secs. 1, 2) to establish inferior federal courts and to fix their jurisdiction does not authorize the legislature to exercise judicial power[3] nor to abrogate the common law powers of judges acting within such jurisdiction,[4] *e. g.,* the construction of law or fact.[5] Judicial power *"is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision."*[6] A power is not judicial unless it is exercised by judges appointed by the President with the consent of the Senate, holding their offices during good behavior, and receiving fixed salaries.[7] Nor may a

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[2]*Kendall v. U. S.* (1838), 12 Pet. 524, 610-13; *Ex parte Merryman* (1861), 17 Fed. Cas. 9487; *Ex parte Milligan* (1866), 4 Wall. 2; *Duncan v. Kahanamoku* ('45), 327 U. S. 304, 90 L. Ed. 688.

[3]*Kilbourne v. Thompson* (1881), 103 U. S. 168; *Andrews v. Hovey* (1888), 124 U. S. 694, 717; *Prigg v. Pennsylvania* (1842), 16 Pet. 539.

[4]*Den v. Hoboken L. & I. Co.* (1856), 18 How. 272, 284; *Liverpool L. & G. I. Co. v. N. & M. Friedman Co.* (1904), 133 Fed. 713; *Ex parte Robinson* (1874), 19 Wall. 505.

[5]*U. S. v. Klein* (1872), 13 Wall. 128, 147; *James v. Appel* (1904), 192 U. S. 129; *Monongahela N. Co. v. U. S.* (1893), 148 U. S. 312.

[6]*Muskrat v. U. S.* (1911), 219 U. S. 346, 356.

[7]*Re Kaine* (1853), 14 How. 103, 120.

federal court usurp the executive function of suspending a sentence imposed by law without legislative authority.[8]

The grant of judicial power (Secs. 2, 3) to inferior federal courts (Sec. 1, Art. I) in "all cases, in law and equity, arising under this Constitution, the laws of the United States . . ." includes jurisdiction over federal crimes and their punishment[9] by a judge whose decision ought to be as free from the influence of some prosecutor's "Committee" as of a mob that storms his bench or otherwise impedes his judicial function.[10]

The gravity of this question hardly needs elaboration. What Lord Acton said a century ago about the corruption of power, a modern philosopher has amplified. "For if law is anything which Power elaborates, how can it ever be to a hindrance, a guide or a judge?" Thence he answers: "Law has lost its soul and becomes a judge."[11]

Federal criminal jurisprudence has so vastly expanded in late years that there is no session of Congress without urgent petitions for more judges, prosecutors, crime detectors, and other functionaries. If this is not the place to lament a bureaucratic wedge that has been driven be-

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[8]*Ex parte United States* (1916), 242 U. S. 27; *Frad v. Kelly* (1932).

[9]Note 2, *ante; Const.,* Art. I, Sec. 2(3); Amends. 5, 6; 18 *U. S. C.* 3231.

[10]*Jordan v. Massachusetts* (1912), 225 U. S. 167, 176; *Turney v. Ohio* (1927), 273 U. S. 510, 523, 531; *Frank v. Mangum* (1915), 237 U. S. 309, 315; *Moore v. Dempsey* (1923), 261 U. S. 86; *Powell v. Alabama* (1932), 287 U. S. 45, 68.

[11]*Bertrand de Jouvenel "On Power,"* pp. 302, 316; *The Viking Press,* 1949.

tween the people and representative government, it surely is pertinent to remonstrate abuses that may be relieved by the judicial process. For if the final bulwark against oppression is adamant, the tyranny of myriads and swarms of unelected, federal officials and servants is as inevitable as the corruptive aggression of all unbridled power has always been and ever will be. The time to arrest an unconstitutional tendency is in its incipiency. "Every journey to a forbidden end commences with the first false step."

The judicial process is indivisible. The only influence a judge is entitled to heed is that of God, his only accredited oracle (*Deut.* 1:16, 17; *Clark's Biblical Law,* 438, 32-40, 47; *Bacon's Essay, "Judicature."*) Though "made of the same stuff as other men," a judge must be "perfectly and completely independent with nothing to influence or control him but God and his conscience." (*U. S. v. Manton* (2 Cir. 1938), 107 F. 2d 834, 846 (quot. Marshall, C. J.). History is not without cruel example in Inquisition and Star Chamber of the disobedience of Moses' ancient commandment and what respect men have learned of the rights of their fellows is in no small part attributable to the local judge who finds his enlightened guidance in "God and his conscience." Let not this oracle be fogged by the breath and it never will be corroded with the influence of extra-judicial "Committees."

XI.

Defendants Were Denied the Fair and Impartial Trial Guaranteed by Due Process of Law in the Fifth Amendment.

Appellants insist that errors involving the denial of motions for acquittal and a new trial because of the insufficiency of the evidence are not within the Harmless Error Statute which is confined to errors that "do not affect the substantial rights of the parties" (28 *U. S. C. A.,* Sec. 391; *F. R. Cr. P.,* Rule 52(a)); nor are the other errors harmless "if upon consideration of the record the court is left in grave doubt as to whether the error had substantial influence in bringing about a verdict" (*Krulewitch v. U. S.,* 93 L. Ed. (Adv. Op.) 624, 627). This Court has recently said that where "no one incident is sufficient to warrant reversal," their appraisal "to determine whether, in the aggregate, they adversely affected the substantial rights of the appellants" necessitates their consideration "in their natural and proper setting, namely, the entire record" (*Todorow v. U. S.* (9th Cir. '49), 173 F. 2d 439, 448).

The difficulty in applying the foregoing rule upon any appeal leaves a litigant largely at the mercy of the trial court insofar as the judicious appraisal of witnesses and evidence is concerned. It may be that, with the aid of improved mechanisms for the visual and articulate reproduction of courtroom scenes and utterances, appellate courts will be able to appreciate sufficiently of the atmosphere of the trial to find a better rule than that which closes the door upon a party whose preponderance

of evidence is denied efficacy because the appellate judges could not see or hear perchance one dissident who testified to the contrary. None the less, appellate courts recognize that such trial atmosphere as is imparted to them by the record must be considered in determining the fairness of the action complained of *(supra)*.

In this case, the appellate court is given an insight at the outset of the trial of one influence that dominates all others. During a preliminary colloquy between Court and counsel concerning the issues and anticipated evidence, wherein defense counsel emphasized the danger of improper influences upon the jury, the Court replied: *"They might do that, Mr. Rose, but I have ultimate faith, utmost faith, that it achieves justice, and I have never seen a verdict yet come into this courtroom that I could say was unjust"* [R. T. 50].

In discussion of the evidence with counsel during the hearing of the motions for a new trial, the Court observed that John Buscemi "is a confessed perjurer" [R. T. (V) 1293]; and "like any case that is built on circumstantial evidence, it is easy to find strong views on both sides" [1305]. Defense counsel pointed out the influences and dearth of evidentiary substance in the words and scrolls conjured by the prosecution. The Court replied, *"Juries don't convict people on those things when they are told before they may convict they must believe from the evidence beyond a reasonable doubt and to a moral certainty that the defendants are guilty. If that is so that they must acquit them."* [*Ibid.* 1303-4.] Although "unmitigated fiction," to requote Mr. Justice Jackson, it is never-

theless true that "out of the abundance of the heart the mouth speaketh" (*Matthew,* 12:34).

Therein is not only further proclamation of the perfection of juries, but in the setting of motions to acquit and for a new trial, where the judge was obliged to determine credibility and weigh evidence, he resolved the question from the posture of the jury's belief. *The judicial question was, not what they believed, but what they were entitled to believe from the judge's appraisal of credibility and evidence.* By his own revelation, the learned trial judge denied consideration of their motion according to the only standard and in the only tribunal in the federal system that is competent to weigh evidence. (*Applebaum v. U. S.* (3 Cir.), 274 Fed. 43; cert denied 256 U. S. 704.) In that case it was said (46):

> "If a defendant asks that a verdict be set aside because it is not supported by the required weight of evidence, his motion is addressed to the discretion of the trial judge. In order properly to exercise that discretion it is manifest that the trial judge, as well as the jurors, should attentively consider and weigh evidence as it is being introduced, *because in that respect he is sitting as a thirteenth juror. It is the exclusive and unassignable function of the trial judge to grant or refuse a new trial in cases of conflicting evidence.*"

The *Court then* contrasts the function of an appellate tribunal in determining whether any substantial evidence supports the verdict and says:

> "But the review of that question of law is the exercise of a function that should not be confused with the non-transferable function of the trial judge in acting as the thirteenth juror."

The learned trial judge is a man of stubborn convictions. While indubitably sincere in vindicating the many verdicts returned in his Court, the revelation discloses a Utopian state of existence which has not been heretofore officially recognized in the history of mankind, nor suggested by the result of this case. Of all the necromancy, wizardry and voodooism that conspires to iron-curtain, the cracks of truth from human consciousness, none is more subtly venomous than the pharasaical heresy of mortal omnipotence (*Genesis,* 3).

The commendable aspiration of righteous thinking persons who attain to perfection is not to be confused with the reality that in this "Valley of Decision" life is an experiment and evolution has not yet run its course. For any judge to become hypnotized with the notion that an unjust verdict has never been returned in his court is to confess a delusion respecting the propensity of persons to err and the universal capacity therefor which is adamant to its discernment or correction. For error is no more cured by kindness than is darkness removed by the night. This trial had its inception and ordeal under the predominating influence of a trial judge who implied very strenuously then, as he asserted thereafter [R. T. (V) 1303-4] that the jury, like the ancient kings, could do no wrong. Bitter experience has constrained Anglican jurisprudence to find the contrary.

The foregoing does not in the least challenge the sincerity or good intentions of the trial judge, but necessarily emphasizes an insuperable barrier to the avoidance of error by granting a motion to acquit and to the correction of error by granting a motion for a new trial. In fairness, it is admitted that throughout the extended trial of the action the Court made many difficult decisions and

manifested commendable diligence and attention to the proceedings and their expedition. But whether the individual be saint or sinner, the object of his vision will always be colored according to his mental window-panes.

While it may have been an oversight in the first instance that the 150 written exhibits were not shown or read to, or taken by, the jury, there is no other apparent reason for the Court's statement upon the motion for a new trial that he was not surprised at an early verdict [R. T. (V) 1292] than his imputed omnipotence to members of the panel who, by this time, were not only incapable of injustice but seemingly had become imbued with some miraculous sense whereby they could discern and weigh the documentary evidence without any articulate means for its perception!

Defense counsel was indulged at great length in presenting his motions for acquittal and new trial [R. T. 934, 1274]. The burden of those motions was directed to the insufficiency of the evidence which appellants have undertaken to expose in the preceding sections of this brief. The trial judge enjoyed a prerogative which is denied appellate courts in that it was his duty to pass upon the credibility of witnesses and weigh the evidence. From time immemorial our jurisprudence has clothed trial judges with this supervisory power over verdicts. Its exercise not only demands an impartial review but, throughout that process, a mind that is not obscured by the Utopian dream that jurors are incapable of somnombulence, distraction, stupidity or error. That remedy is denied

before the process is invoked where the mind of the judge is obsessed with the conviction that a jury in his Court could do no wrong. It followed, therefore, as was to have been expected, that the motions for acquittal and new trial resulted in no correction of any of the errors complained of, while appellants were denied a salutary right which contemplates a judicial rather than a Utopian function.

Conclusion.

It is respectfully submitted that the judgments appealed from should be reversed.

Respectfully submitted,

A. Brigham Rose,

Attorney for Appellants.

APPENDIX.

Fact Brief.

Foreword: The bulk of the evidence was addressed to Count I, charging defendants jointly with concealing $25,000.00 and a Chevrolet car (*Points II, III, IV*) which incidentally relates to the charges of false swearing in *Counts II and III* (*Points VI, VII*). The pertinent oral and documentary evidence concerning the foregoing is discussed in this Fact Brief, except for what has already been presented with the objection to the accountant's summary, opinion and charts (*Point VII, ante*) and the Scheules' transaction (*Point IX, ante*) whose immediate availability renders extensive repetition necessary.

The evidence indisputably shows that defendants, husband and wife, formed and conducted a partnership business whose capital and assets comprised all of their community property. The wife owned several parcels of realty, as her separate property, which she sold before bankruptcy and applied the proceeds upon partnership operations and debts and the living expenses of herself and family. Those advances were made when the partnership was insolvent and so continued until bankruptcy. But it is the proceeds of those sales that plaintiff charges *both* defendants with concealing!

The latter deduction is attempted from plaintiff's analysis of the income and expenses of defendants, as individuals, and as a partnership, by F. B. I. accountant Kirk, whose audit and summary are confined to partnership, bank and escrow records [Exs. 57, 58]. The partnership books were not posted to the date of bankruptcy and there were many purchases of lumber and operating expenditures for the partnership that were not recorded in the partnership books. Defendants did not keep in-

dividual books of account. Evidence of the wife's individual sales was produced from bank and escrow records and her testimony. This expert, who was the spearhead and backbone of the prosecution, arbitrarily disregarded outlays for thousands of dollars worth of supplies, whose records were unsatisfactory to him. He also omitted thousands of dollars in purchases whose evidence he refused to accept (*Points II, VII, ante*).

However, appellants perceive no necessity for reproducing here the mass of foundational evidence of receipts and expenses utilized by plaintiff in the summary and conclusion of its expert. It will suffice for this case to accept that foundation for argument only in so far as it is correct and demonstrate from its omissions and fallacies that a conclusion of concealment is unwarranted. Hence, appellants will merely refer to the foundational items and then proceed to the points which demolish the verdicts.

It is noted in *Point II, ante,* that defendants' bankruptcy schedules and examinations as to their individual or cash assets by the referee are not made the subjects of indictment for false swearing as in the case of the car under *Counts II and III, post.*

Preceding the latter is a general statement of undisputed facts bearing upon the relationship of the parties, their business, assets and bankruptcy.

Separately summarized is all the evidence bearing upon the ownership of the Chevrolet car, which is also the subject of alleged concealment in *Count I,* the wife's alleged false bankruptcy schedule in *Count II,* and the husband's alleged false testimony in *Count III, post.*

History of Business and Bankruptcy.

Defendants intermarried 27 years ago and have two married children. Prior to defendants' partnership, formed October 20, 1945, the wife, who had resided in California for 30 years [R. T. 1090], had no similar business experience [1062-3]. The husband had been a carpenter, realtor and a refrigeration engineer and dealt in building materials about 6 months before the partnership [1090, 1175]. They come of good family without suggestion of any criminal record [1309-10].

Their partnership, Pacific Firm-Bilt, had no other members than themselves and until February, 1946, its headquarters was a demonstration house on Colorado Boulevard, Pasadena, California, whence it was moved to property purchased by Mrs. Noell for $16,000.00 at 128 West Pomona Avenue, Monrovia, California [1063]. It engaged in buying and selling lumber, windows, sashes, doors and building material for housing accommodations. In March, 1946, they set up a small mill in their lumber yard where some processing was done. When orders were not immediately filled, sales were made upon contracts for future delivery [1091-4].

Due to the lumber shortage and the necessity for refunding upwards of $50,000.00, the partnership became financially involved to the extent that Mrs. Noell liquidated her separate holdings to keep the business afloat. There were assets consisting of the real estate, purchased by Mrs. Noell and used by the firm (appaised for $35,800.00) its equipment and lumber ($8,000.00) and some accounts receivable and cash, against $49,713.93 in creditors' claims and the average employment of 10 men had dropped to 5 when its operations ceased about May 13, 1946 [R. T. 175-83, 189, 197-213, 1101]. Creditors'

suits were pending and threatened [R. T. 1101, 1144-6 [Ex. 46] 1030-40]; and on May 22, 1946, defendants filed individual and partnership bankruptcy petitions [Ex. 4 *et seq.*] and were adjudicated bankrupts [Exs. 1, 2, 3] when Crules R. Cheek was appointed receiver, and on July 3, 1946, trustee [Exs. 4-H, 4-I, R. T. 167 *et seq.*]. Numerous examinations and hearings were had over several months before the various referees to whom the matters were assigned [Pltf. Ex. 4-J].

Plaintiff's Case.

Plaintiff's case in chief, concerning the concealment of cash (it had no rebuttal) consisted of foundational evidence, oral[1] and documentary[2] to show the *combined* income and expenditures of defendants, individually and

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[1]G. B. Kellogg [R. T. 71]; C. K. Cole [77]; R. E. Wilson [84, 403, 765]; W. J. Brewer [87, 389]; Ruth Daley [112]; Isabelle Atkisson [119]; A. R. Nold [127]; Harry Barber [133]; R. H. McCalla [144]; Crules R. Cheek [167, 638]; H. Allen Stanhilber [329]; Mrs. Josephine Cross [331]; Frank Grillo [337]; Henry H. Carter [341]; Neola G. Wittler [346]; Richard B. Morey [349]; Lester L. Wimberly [354]; Bernice Bailey [410]; Maurice A. Wolfe [415]; Amy J. Both [574]; William Gosman [618]; G. B. Kellogg [623]; Ruell D. Callahan [650]; Dennis Earhart [900]; Johnny Richardson [906]; Theodore Peterson [909]; Mrs. L. T. Knapp [911]; Mrs. Anne Glasbrenner [914].

[2]Pltf. Exs. 1, 2, 3 [R. T. 22, 23]; 4, 4A, B, C, D, E, F, G, H, I, J [R. T. 29, 30, 52, 53, 54]; 8, 9 [78, 678]; 10, 11 [84, 678]; 12 [87, 678]; 13 [88, 679]; 14, 15 [89, 679]; 16, 17 [91, 108-9]; 18, 19, 20, 21 [91, 683]; 22, 23, 24 [98]; 25 [114]; 25-B [117]; 26 [120]; 36, 37 [128]; 27, 28, 29, 30, 31, 32, 33, 34, 35 [132-3, 686]; 40 [162, 926]; 41 [174]; 42, 43, 44 [182, 695]; 45, 46 [183, 696]; 47 [185, 697]; 48 [197]; 49, 49-A [699]; 50 [245, 699]; 51 [257, 701]; 52 [277, 703]; 53, 54, 55 [278, 703]; 53, A, B, C, D, E, F, G, H, I, J, K, L, M [280, 703]; 54-A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P [290, 703, 1143]; 55 [707]; 55-A [620, 706]; 56, 56-A [578, 708]; 56-B [667, 708]; 56-C [668, 708]; 56-D [1052]; 57, 58 [732]; 59 [304, 709]; 60 [317, 710]; 60-A [710]; 61 [318, 710]; 62 [322, 702]; 63 [329, 711]; 64 [332]; 65 [337, 712]; 66 [342, 712]; 67 [350, 712]; 68 [351,

as a partnership *without segregation,* which was summarized by F. B. I. accountant, George M. Kirk[3]

No useful purpose would be subserved in detailing this foundational evidence because, assuming its verity, as has been shown in the analysis in *Points VII and VIII, ante,* plaintiff's claim of $32,011.67 as unaccounted for by defendants, excludes defendants' cash and check expenditures for which witness Kirk allowed no credit and is based upon the following fallacies in his summary and charts [Pltf. Exs. 57, 58, R. T. 291, 296, 732]:

(1) February, 1946, Mrs. Noell purchased as her separate property the premises where the partnership operated, for cash [Ex. 26, R. T. 119-24, 178]	$16,000.00
(2) Scheules' transaction (*Points VII, VIII, ante*)	17,000.00
(3) James A. Noell purchases by check not credited in Ex. 57 (*Point VII*) [R. T. 872-87]	8,000.00
(4) Cash purchases by James A. Noell, excluding Scheules' deal (*post*)	12,380.00
(5) Cash advanced to Louis Stroh for lumber purchases (*post*)	3,000.00
Total credits omitted from Exs. 57, 58	$56,380.00

712]; 69 [370, 712]; 70 [379]; 71 [390, 714]; 72 [393, 714]; 73 [394, 715]; 74 [395, 715]; 75 [404, 715]; 76 [413]; 77 [416, 717]; 78 [471]; 79 [524]; 80 [576, 717]; 81 [621]; 82 [624]; 83, 84 [625]; 85, 86 [626]; 87 [627]; 88 [628]; 88-A [961]; 89 [631]; 90 [640]; 91 [652, 917]; 92, 92-A [1173]; 93, 94, 95, 96, 97 [658, 718, 720]; 98 [766, 767]; 99 [926]; 100 [903]; 101 [907]; 102 [910]; 103 [912]; 104 [915]; 105 [1047]; 106 [1051].

[3]R. T. 161, 235, 269, 658, 849.

The last tabulation allows defendants nothing for cash expenditures from October, 1945, to May, 1946, inclusive, for operating the business, *e. g.*, labor, utilities, transportation, etc., and for their home and personal maintenance for which no records were produced; nor does it include cash refunds by defendants to customers for which records were surrendered to the receiver but not produced. James A. Noell made several trips to Oregon and other distant points in quest of lumber. Witness Kirk admittedly excluded all of said credits in his summary (*Point VII, ante*). But the foregoing tabulation is enough to show that no cash remained for concealment.

There is hereinafter produced a further accounting of defendants' receipts and disbursements.

DEFENSE.

Amelia E. Noell's separate property. There can be no doubt from Mr Kirk's summary and charts [Pltf. Exs. 57, 58] that, except for the cash contributions and expenditures by Mrs. Noell for the partnership, it was insolvent in March, 1946.

On and before October 20, 1945, she owned as her separate property numbers 4195 York Boulevard, Los Angeles, California, and 429 West Longdon Avenue, Arcadia, California, which were sold by her, as shown by the escrow papers, reflected in Kirk's chart [Ex. 57] and whence she personally received and paid into the partnership business and for "fulfilling contracts" [R. T. 1064, 1084]. Her personal records are confined to her check stubs [1078]. Witness Kirk charges her with the receipt of $16,636.58 from the sales of such properties [R. T. 888-9; Ex. 57].

That *separate* property in personal control was erroneously included in the lump balance of $32,011.67, which should reduce the amount chargeable to *both* defendants to $15,385.09. It is next shown, however, that each defendant accounted for *all* monies within his or her control.

Disposition of cash receipts by Amelia E. Noell. April 3, 1946, Mrs Noell cashed a $3,400.00 check [Exs. 28, 57] which was used for family expense and the partnership [1128-30]; likewise, April 5, 1946, a check for $2,339.33 [Exs. 17, 57; R. T. 1130-33]; also April 10, 1946, $4,000.00 for "buying lumber" [Ex. 29], which was part of the $6,400.00 from the sale of her property [R. T. 1133-51]. Likewise, $7,000.00 from an escrow [Ex. 25-A; R. T. 1136-8]. A check dated April 22, 1946 to Mr. Noell for $2,500.00 [Ex. 30], making a total of $19,239.33 checks cashed in April, 1946, was similarly used [1138-41; see, also, pp. 131-3].

Likewise in May, 1946, Mrs. Noell received the proceeds of the following checks, which were used for similar purposes, medical and dental bills,—May 1, $400.00 [Ex. 35]; May 2, $158.01 [Exs. 34, 54-P]; May 10, $500.00 [Ex. 32]; May 10, $800.00 [Ex. 21]; May 10, $443.55 [Ex. 20]; May 20 $399.48 [Ex. 25-B]; May 13 $271.30 [Exs. 31, 55-B]. The foregoing are summarized on Plaintiff's Exhibit 57 [R. T. 1141-5] and total $2,972.34, plus the Buscemi check of *$846.00* for the sale of the car cashed May 13 [Ex. 69; R. T. 1155-61].

From the foregoing, defendants also paid $200.00 by check [Ex. 92-A] as fees to their attorney for the bankruptcy matters and $100.00 costs [1167-9, 1172-4]. Defendants' household expenses never exceeded $400.00 per month. Some cash was paid to Stroh as well as Mr.

Noell to buy lumber and make refunds on contracts. None of the cash charged to defendants on Exhibit 57 was retained by them after bankruptcy [1170-1].

Disposition of cash receipts by James A. Noell. Defendant James A. Noell was in charge of the yard and the buying of materials, which were difficult to obtain. He made many "under the counter" purchases besides those for the partnership by Louis Stroh [R. T. 980 *et seq.*] and enumerated cash outlays to ten dealers and Scheules for which no invoices or receipts were given and amounting to over $27,000.00, $2,000.00, $2,800.00, $1,000.00 minus, $980.00, $1,800.00, $.....(?), $.....(?) $2,000.00 and others he could not recall [1175-86] besides $1,800.00, to contact a dealer, Barger [1186-8, Defts. Ex. F]. He paid $17,000.00 on the Scheules deal [*Point VIII, ante;* R. T. 1217 *et seq.*]. Stroh set up the Monrovia yard and mill for defendants in February, 1946. Lumber was received in March [980-5]. He always carried defendants' cash for lumber and parts purchased to and including May, 1946, from 15 dealers without invoices or receipts [985-93]. He made hundreds of such purchases from $39.00 to $900.00 [1009-28, 1043-56, 1058-9].

Refunds. Mrs. Noell ran the office, attended to banking, kept the books with the assistance of others, and drew blueprints for prospective purchasers of houses under contract, *e. g.,* Plaintiff's Exhibit 47, though she surrendered as many more of said contracts to the receiver, which plaintiff has not produced in court [1073-7]. She did none of the purchasing or construction work [1083-4].

Numerous witnesses attested the lumber shortage, of which judicial notice may be taken, as confirmed by Harry Barber, who testified to defendants' efforts to

produce building materials in Oregon [R. T. 133-44]. When orders could not be filled, refunds were made and this occurred under many contracts. Some refunds were made by check [Ex. 50; R. T. 257 *et seq.*] and others by cash for which receipts were taken and delivered to the receiver, but not shown in Plaintiff's Exhibits 57 and 58, nor were same produced by plaintiff [1076-8]. Witness Kirk's summary of $36,297.47 of such refunds is confined to canceled checks [Ex. 58] and *does not reflect those made in cash* [1084-6].

There was no "average" deposit by customers; the amount depended upon the kind of deal which occasionally was for the full price and sometimes for less. When the material was obtained and paid for it was delivered [1095-6].

Books and Records. Mrs. Noell had no training as a bookkeper. The partnership books were set up by accountant Matheson [Exs. 45, 46] and contain entries by her, him and Mrs. Neola Whittler, her sister and a bookkeeper, and were not posted to date because she frequently erred in entering items in the wrong column, and as the accountant admonished her not to make alterations, she adopted the practice of making and preserving memos. of transactions to be entered by him or her sister. Defendant surrendered all of this memoranda, more than 100, to the receiver with the rest of defendants' records, including sales contracts [Pltf. Exs. 42, 43, 44, 45, 46, 47; R. T. 182-8, 1078-82]. Some were never entered [1095-7]. Exhibit 45 shows cash entries to April 15, 1946, exclusive of unentered memos., but she is not sure. However, no memos. after April 15 were entered [1097-1102]. Money receipts were kept in the customers' files and bank accounts. Refunds were made by check after

April 15 and the contract was so marked [1112-27]. The receiver permitted a Mr. Minnick to remove those records to his home [1083].

Surrender of Assets. Each defendant scheduled all property, cash, bank accounts, assets and debts owned or owed by them [Pltf. Exs. 4, 4-A, 4-B, 4-C, 4-D, 4-E, 4-F, 4-G, 4-H, 4-I and 4-J] as of bankruptcy and have concealed or withheld nothing from the receiver and trustee in bankruptcy [R. T. 1085-7, 1215-17]. All bank accounts were surrendered to the receiver [1123-73].

The Buscemi Car Deals. The car is the subject of alleged concealment by both defendants in Count I; of an alleged false schedule by the wife in Count II; and of alleged false swearing by the husband in Count III. The entire evidence concerning said car as to all of said counts is embraced in the testimony of *John Buscemi* [R. T. 360, 419, 436, 453, 581-2], *Lena Buscemi* [R. T. 589, 596, 610], *G. B. Kellogg* [R. T. 74, 623, 633, 638], *Clarence E. Palm* [R. T. 961, 970, 975, 976], *Louis Stroh* [R. T. 980, 1009, 1055], *Amelia E. Noell* [R. T. 1062, 1090, 1118, 1165, 1172] and *James A. Noell* [R. T. 1174, 1217]; and *Plaintiff's Exhibits* 5, 6, 7, 38-A, 38-B, 38-C, 42, 62, 65, 69, 70, 70-A, 70-B, 78, 82, 83, 84, 85, 86, 88, 89; *Defendants' Exhibits* C, D, E.

Foreword: Without arguing the evidence here, note that under Count II the wife is charged with falsely swearing that she did not own the car, as of bankruptcy, and under Count III the husband is charged with falsely testifying that she sold it to Buscemi and did not own it,

as of bankruptcy. Plaintiff's theory was that after said sale, Buscemi agreed to re-transfer the car to the wife.

That depended entirely upon the evasive, incoherent, gibberish of the self-confessed perjurer, John Buscemi, and his spouse, Lena, whose leaping and loping from one contradiction to another did not accredit their tutelage to ring-master Kirk until defense counsel compelled them to grudgingly admit that between their contrary testimony in the Bankruptcy Court and this trial, it required over 100 lessons for them to learn what pleased the maestro for them to say when, where and how to say it. As neither of them has been indicted as accomplices, accessories or conspirators to the offenses in which they could not have implicated defendants, without implicating themselves, it is assumed that the lords of bankruptcy looked upon their handiwork and found it good notwithstanding that John found more difficulty in remembering his lines after the judge banished Lena from the forum for wig-wagging to him while he was in the witness box [543].

When another Ananais and Saphira were hailed before Peter during the pentecostal interlude for cheating their fellows and lying before God, they were wound up, carried away and buried (*Acts,* 4, 5). It is tragic that their reincarnation in this generation should be rewarded by the approval of a system of justice whose leading sale's talk to the dubious aborigines is its enlightenment. Perhaps they are not blind enough to miss the same mythology in new raiment that has plagued them for centuries and so decline to substitute bewitching formulas for unadulterated witchery (see, Frazer in *The Golden Bough,* and Cassere in *The Myth of the State*).

PLAINTIFF'S EVIDENCE.

John Buscemi [360], who does not read or write English, testified on direct that he was in the chicken business and in May, 1946, also in the taxi business; that he bought lumber from defendants for three houses and one carload of lumber, which latter he paid for by check for $2,050.00 [Pltf. Exs. 62, 65; 365].

In May, 1946, he bought a 1941 4-door Chevrolet sedan from defendant wife in the office of his lawyer (Macbeth) for which he gave her his check for $846.00 [Pltf. Ex. 69]. ". . . *You know, I wanted to buy the car, because at the time I thought it was a bargain,* $846.00" [369]. She and he then and there signed the pink slip for the car [367-72]. Leaving Macbeth's office, she said, " 'What am I going to do now? I haven't got no car.' I said, 'Mrs. Noell, you feel that way, you think I got a bargain, *there is the car back. I don't want the car. You done me some favors.* Now I don't want the— You do that, O. K.' She says, 'I bring the money right back to you' " [R. T. 372].

Note: She *then had his check in her possession and the pink slip could not have reached Sacramento for the transfer in that interval of a few minutes!*

The foregoing is the last participation which defendant wife is shown to have in the use of, or any transaction concerning, said car. Then follows:

> "Q. Well, did she give you the money back? A. He did * * * Mr. Noell" [372, 418].

About 3 days later, defendant husband delivered to him near his house $846.00 in cash in an envelope, saying, "Here is the money, $846.00," "It is all there, Johnny," drove out, and which money Buscemi handed to his wife

without counting it and which she banked, he "guessed." (*Note, witness does not testify that defendant said the money was for the car or what it was for* (see his cross-examination and James A. Noell, *post*).) [373-4]. The car was used by the husband, not the witness [375], but kept at the latter's taxi stand [420-1].

The pink slip was in Buscemi's name and the car was insured in his name, and he paid the premium which the husband repaid him "right then" in the sum of $55.00 [375-7].

While the car was driven by one Stroh, employed by witness, it was damaged and witness paid the repair bill by check for $483.85 [Pltf. Ex. 70; 377-80]. Thereafter he received and banked the insurance company's check for the damage [380-1]. *doesn't remember giving Noell any of that money* [433-6].

The witness then rambled on about Mr. Noell building the former's house and buying some material therefor and paying him the "difference" out of the check proceeds [381-4]. *Comment: In other words, Buscemi is indebted to Noell for the building and for the insurance proceeds, yet he says that he merely paid Noell the "difference" between the two amounts!*

On June 29, 1946, he executed a written authorization [Pltf. Ex. 70] to enable defendant husband to obtain delivery of the car from the repair man "and give him this car to use until my return from Detroit, Michigan, which return I expect to be on or about the 1st day of August, 1946" [384-6].

In November, 1946, he sold the car to Palm, introduced to him by defendant husband, who accompanied them to the bank where witness was paid $1,400.00 in cash by the buyer, whereupon they went around the corner and Noell

"lend me money—to buy turkeys, about $1,000.00," which witness repaid (partly by check and cash) a month or two after the holidays. December 13, 1946, his stenographer drew a check for $1,000.00 "cash" [Pltf. Ex. 70] which witness cashed and gave to Mr. Noel [R. T. 422-33].

Note: Buscemi never produced the check for the balance of the $1,400.00 which he testified he gave to repay Noell on the latter's loan from the car sale and Exhibit "70" does not indicate what the check was drawn for other than "cash."

Cross-Examination: After he built three houses and found difficulty in obtaining lumber, he operated a taxi cab business in Rosemead with three cars besides his personal Chrysler [436-44], wherein he used the car purchased from Mrs. Noell [507] and which Chrysler he frequently loaned to Noell after buying the Chevrolet [443-4].

He wanted to buy the Chevrolet from her, had his lawyer check the price and prepare the transfer papers and witness delivered to her the $846.00 check [Ex. 69]; there [444-6]. He had previously bought three cars in California and knew that in order to show his ownership he had to get the "pink slip" and when Mrs. Noell signed it over to him [Pltf. Ex. 38-A] that he owned the Chevrolet; and if he transferred it he had to sign the "pink slip" [453-7]. He signed no "pink slip" for such transfer until his sale to Palm on November 19, 1946 [Pltf. Exs. 38-B and 38-C]. Exhibit 38-A was signed by Mrs. Noell and witness in said lawyer's office, so that the car could be transferred to him and for which a new pink slip, Exhibit "38-B" was issued to him and which he later signed over to Palm at the bank [458-68] where

he also signed and had to sign his bill of sale to Palm to sell him the car [Ex. 70-A] and who paid him $1,425.00 in currency. He signed no "pink slip" between Exhibits 38-A and 38-B for the Chevrolet [474-88].

His wife attended his "insurance agent" and with her received a policy from Hartford Accident & Indemnity Co. and Hartford Fire Insurance Co., dated May 21, 1946, insuring them against personal and property damage and public liability on the Chevrolet referred to in Exhibits 38-A and 38-B [Ex. 78; 468-71]

Witness Stroh, while employed by him, was in an accident with the Chevrolet, which was repaired by Allen A. Couch of Uplands Garage for which repairs Buscemi issued his check No. 81 June 29, 1946 of First State Bank of Rosemead, for *$483.85* [Ex. 70-B] and reported said accident to the police. As he was leaving for Detroit and the amount of the repairs was unknown, he signed the check in blank and left it and written authorization to obtain the car with James A. Noell [Ex. 70; 488-94]. Within one month he returned home and received the insurer's check which he banked [520-3].

Impeachment: He talked to Kirk about 100 times after first testifying in the Bankruptcy Court [494-8].

They didn't drive to Macbeth's office in his Buick and then pick up the Chevrolet [500-1] but he admits testifying in the Bankruptcy Court on April 22, 1947, that they drove in his car and then picked up the Chevrolet and thereafter witness loaned Noell the Chrysler and Buick to drive. On June 12, 1946, he testified that he gave Mrs. Noell the $846.00 in his home for the car which he "took away with him" and got the transfer papers. The car was used by his employee, Stroh [507-16].

On April 22, 1947, he testified before the Bankruptcy Court that about one week after obtaining the Chevrolet he used it for one week in his taxi business and explained that it was during a strike when James A. Noell borrowed his Buick [505-7].

He never received other than the one envelope from Noell, as testified on direct [524] but admitted that upon buying a car of lumber from him on May 9, 1946 [Ex. 70] the latter delivered an *envelope* with bill of lading, etc. therefor [524-30]. (*Note:* Buscemi issued his check which was deposited May 1, 1946) [Ex. 5; R. T. 1122].

He admitted that in testifying in the Bankruptcy Court on June 12, 1946 (*supra*) he said nothing about receiving any money back from Mr. or Mrs. Noell but lied about it; that thereafter he had at least 25 meetings with Kirk and on April 1, 1947, he appeared before another bankruptcy referee in the absence of defendants and their counsel and testified that on May 13, he received money from Noell which he gave to his wife; that he recalled nothing being said by Mr. or Mrs. Noell [531-42].

He admitted not testifying in the Bankruptcy Court that Noell handed him $1,000.00 of the $1,425.00 Palm payment until he heard his wife testify that he brought it home and showed it to her and then banked it. He had previously testified that Noell received all of the payment. His wife also testified in the Bankruptcy Court that her husband received all of the $1,425.00, did not know what he did with it, and when she told the Noells about Kirk interviewing them that they had "nothing to worry about, so long as you told the truth" [542-59].

Redirect [560]. Before testifying in the Bankruptcy Court, Noell told him to testify that the car was his, that he needed it in his taxi business [561-3].

In Macbeth's office when he promised Mrs. Noell the car back for the money, he added:

> *"I give her the money back so I can have the car back"* [565:5-6].

When Stroh was building Buscemi's house, Noell was there and bought "stuff, everything for the house." They both used the Chevrolet and Buick. He left a check signed in blank with Noell [Ex. 70-B] to pay for the repairs of the car and of which Noell said, "Whatever it is, then I pay you back." (*Note:* Witness filed and collected an insurance claim for this expense with Noell's assistance and kept the money. Noell may have told Buscemi in effect that he would be reimbursed though not with Noell's personal funds) [R. T. 565-7].

After he first testified in Bankruptcy Court, he first talked to Kirk [568-72].

He banked the insurance check for the car damage and then *"I paid the money back, what I owed him* (Mr. Noell) *for the work he had done and all that stuff, I paid him"* [581-2].

Recross [582]. He accompanied Stroh and Noell to the police to report Stroh's accident and represented himself as owner of the car [586-8].

Comment: Note (1) that Buscemi received and retained title and possession of the Chevrolet from its purchase from Mrs. Noell to his sale thereof to Palm six months later; (2) that no terms of re-sale from Mrs. Noell to Buscemi were ever agreed upon; (3) that the alleged and disputed delivery of money to Buscemi three days thereafter was by defendant husband and not by the wife *with no evidence as to what it was for and which*

was not attended by any transfer of title or possession; (4) that Buscemi received and retained the entire proceeds of the insurance claim under the policy issued to him; (5) that he is falsified by his prior testimony that Noell loaned him $1,000.00 from the sale of the car to Palm and by every other witness and document on the subject.

Lena Buscemi [589] testified that in May, 1946, Mr. Noell was in front of their place in a car when he gave Mr. Buscemi an envelope which the latter gave her and which she took to the First State Bank of Rosemead, counted the money therein and filled out a deposit slip [Ex. 6] and deposited $846.00 [590-3].

She does not recall seeing the insurance policy [Ex. 78] before [593].

About March 23, 1947, Mr. Noell visited her when she told him that her husband told Kirk the money was returned after the sale of the car. Noell said, "that is bad, he shouldn't have done that—that makes it bad for me and for Johnny too—Johnny can go to jail for that." She said, "Well, if Johnny has jail coming that is all right." He said, "He won't get in it, though, because if I got him in it, I will get him out. I have to go see my lawyer because that's bad" [594-6].

Cross-Examination [596]. She first talked to Kirk in July, 1946, and last about 1½ months ago and did not recall going to the Rosemead Bank until he told her and "for that reason" now claims she did [596-9].

She admitted testifying in the Bankruptcy Court that defendants told her to tell the truth and that she first

testified before the referee that her husband told her nothing about selling the car for $1400.00 and later testified that he did tell her he sold it for $1400.00 and showed her a $1,000.00 bill and was "going to deposit it in the bank," but she didn't know what he did.

> "Q. *Were you telling the truth at that time when you gave the answers to the matters that I have just pointed out to you as appearing in the transcript?* A. *I don't know*" [602-610].

G. B. Kellogg, Vice-President of the First State Bank of Rosemead, testified on direct [623], produced deposit slips and ledger account of Lena Buscemi [Ex. 82]; ledger card and deposit slips of account of John and Lena Buscemi [Ex. 83]; three deposit slips and ledger sheet of Lena [Ex. 84] of John [Ex. 85], one of Lena [Ex. 86]; and other deposit tickets referred to in connection with Exhibit 7; photostat of ledger sheet of Lena's account [Ex. 88]. From May to December, 1946, said depositors had the foregoing accounts. Lena's account was opened July 10, 1945, and on November 28, 1945, converted to a joint account with John [Ex. 89; R. T. 623-33].

Cross-Examination [634]. He produced in the foregoing all the deposit tickets of all the Buscemi accounts from May until December, 1946, which show no deposit by either of them of $1,000.00, $1,400.00 or $1,425.00 between November 19, 1946, and December 20, 1946 [R. T. 636-7].

DEFENDANTS' EVIDENCE.

Clarence E. Palm testified on direct [961] that in November, 1946, he first met James A. Noell, who told him the Chevrolet was "for sale" with a new $100.00 paint job and five new tires, but it belonged to John Buscemi with whom he would have to talk. They went to the latter's chicken house at 48th and Vermont and Buscemi said he would have more money but would sell it. Witness wanted a banker to examine the papers so the three went across the street to the Bank of America, where Mr. Tweedy prepared and Buscemi signed a bill of sale [Ex. 70-A] after Buscemi and witness signed and delivered the pink slip [Ex. 38-B]. Witness then handed Buscemi a $1,000.00 bill, four $100.00 bills and $25.00. Thereafter he received a new certificate of ownership [Ex. 38-C; R. T. 961-9].

Witness arrived in the city two days before and he asked Mr. Noell to drive him out where he could find his way home. The three departed the bank together, Buscemi going to his chicken house and Noell and witness driving to Inglewood. Noell was not out of his presence after the $1,425.00 was delivered to Buscemi and did not go behind the bank with the latter nor hand him any part of the $1,425.00 [969-70].

Cross-Examination [970]. Witness met Noell while looking for a used car sale and saw the "for sale" sign on the Chevrolet for $1,550.00. He offered $1,425.00. Noell said, "Well, it is not my car. It belongs to a friend of mine over here and I will have to go and talk to him. If you want to go with me over there, I will drive you over." They went to Buscemi, where Noell talked to him privately for a few seconds when witness negotiated with him. He put the money in Buscemi's hands and Noell ob-

served a $100.00 mistake, which was corrected. Buscemi placed the money in his pocket and witness never saw it thereafter [970-5].

Redirect Examination. Witness, Noell and Buscemi were together all of the time and under the former's observation until Buscemi left for the chicken house and witness and Noell left for Inglewood [975].

Recross-Examination [976]. Noell was never out of his sight and he observed Noell and Buscemi at all times until they broke up. Noell and Buscemi were not alone together after the money was paid [976-7].

Louis Stroh testified on direct [980] that he is a builder and carpenter and has known defendants since the spring of 1945; while working for Buscemi in May or June, 1946, his wife, Lena, produced Exhibit 38-A and asked him how to have the pink slip transferred and he advised her to mail it to the Motor Vehicle Department in Sacramento [997-8].

June 13, 1946, while so employed, he was driving the Chevrolet with Buscemi's permission and had an accident. The car was taken to the Uplands Garage for repairs and he took Buscemi, Noell and one Charley Guske to the police department where it was reported, a report prepared and signed in the presence of said persons [995-7, 998-1002; Deft. Ex. "B"].

J. D. Montgomery, Claims Adjuster for Hartford Accident & Indemnity Co. [Ex. "C"] sent for him to make an accident report, which he did after Buscemi handed him Montgomery's car [Ex. "C"] and the insurance policy [Ex. 78 for Ident., Deft. Ex. "D"] and asked him to take care of it, as Buscemi was going East. Witness took the policy to the Claims Adjuster [1003-9].

Besides being in his custody while employed by Buscemi, the latter exchanged it for a Chrysler to use in his taxi business during the street car strike in Los Angeles [1003].

Cross-Examination [1009]. After the car accident in June, 1946, when Buscemi went East, James A. Noell supervised the building of an apartment and bought some supplies for him. He saw Noell drive the Chevrolet several times before the accident and thereafter they changed cars occasionally [1028-30].

Redirect Examination [1055]. John Buscemi had the Uplands Police Department change its accident report to show the owner of the Chevrolet as "Rosemead Taxicab Company" instead of "John Buscemi," as originally typed. Buscemi's presence was necessary because the transfer from Mrs. Noell had not cleared the Department of Motor Vehicles [1057-8].

Amelia E. Noell [1062] defendant, testified in chief that the Chevrolet was her separate property wherein her husband and co-defendant, James, had no interest; that at her home in the presence of her husband, Buscemi said he wanted to buy said car and upon her asking the ceiling price, he invited them to the office of Mr. Macbeth, where they went and informed him of the proposed sale. The lawyer reported the ceiling price was $845-6.00 for which Buscemi gave her his check and she indorsed and delivered to him the pink slip and registration card [Ex. 38-A]. The same group then drove back to her home, where the Chevrolet was in the yard, and when she said to Buscemi, "I don't have any car now, and out in Monrovia it is hard to get around" he replied "Don't worry. You can use one of mine or you can call one of my taxis." He then drove away with

the Chevrolet and left her the Chrysler. He or anyone else did not then, nor at any time, state that the Chevrolet was hers or she could buy it back nor did she state that she would return his money, nor did she believe after transferring Exhibit 38-A that she had any interest in said car [R. T. 1064-8].

That she never was in bankruptcy before and was advised by counsel in preparing her petition and schedules; that she signed Schedules "F" and "G" in Exhibit "42," and then owned no vehicle or interest therein [1069-71].

That from the sale to Buscemi to the present moment she never handed anyone, including her husband, cash, check or otherwise, to be paid to Buscemi as a refund for the car [1071-2].

That she received Buscemi's check of May 9, 1946, for $846.00 [Ex. 69] for the car and indorsed and cashed it the following Monday afternoon at the First State Bank of Rosemead upon which it was drawn; that none of said proceeds were delivered to Buscemi or anybody else [1072-3].

That at the time of bankruptcy, she withheld no property from the trustee [1086-7].

That she visited the Buscemis' to give a present to their granddaughter and learned that Kirk had repeatedly called upon them; she did not tell the Buscemis' to conceal the truth or lie but to state the fact [1088-90].

Cross-Examination [1090; 1155]. She received Buscemi's check [Ex. 69] on Saturday, May 11, 1946, but it may have been erroneously dated May 9, 1946; that they went to Macbeth's office for him to examine the papers and be sure she could sell the car and the lawyer said she could if it was not attached. The partnership business was attached May 13, 1946 [R. T. 1155-8].

She cashed Exhibit 69 and gave $400.00 or $600.00 to Mr. Noell to pay bills with [1160-1]. When Buscemi bought the Chevrolet he told her she could use any of his cars or taxis and the Noells did use the Chevrolet, Chrysler and Buick intermittently. Sometimes the borrowed car was kept over night at their home, if they were to use it the next day, otherwise it was returned to Buscemi [1161-4].

Redirect [1165]. In the conversation between the Noells and Buscemi concerning Kirk, Buscemi told Mr. Noell, "Well, if you tell me what you want me to say I will say it." Noell advised him to tell the truth [1164-5].

June 29, 1946, Buscemi executed the authorization to Noell to use the car in the former's absence [Ex. 70 for Ident., in evidence Deft. Ex. "E"; R. T. 1165-7].

James A. Noell, defendant, testified on direct [1174, 1188] that he never owned and was never promised an interest in the Chevrolet described in Exhibit 38-A. Its sale was first discussed two months before. He was present when his wife and Buscemi signed Exhibit 38-A on May 11, 1946, about noon, in the office of Mr. Macbeth, attorney for Buscemi, and which attorney witness did not theretofore know. They wanted the ceiling price which Macbeth reported as $846.00 and approved the transfer of said pink slip. Thereupon Mrs. Noell and Buscemi exchanged pink slip and his check for the price [1189-91].

Buscemi in his Chrysler drove to Macbeth's office from and back to their home in Monrovia. After the transfer, Mrs. Noell lamented her lack of a car and Buscemi replied that he had several and a taxi which she could use. Nothing was ever said or intimated about her returning the purchase price or to be considered as owning the car. It had not been attached [1191-3].

When they returned home each defendant delivered a set of car keys to Buscemi, who drove away with the Chevrolet after saying that they could use the Chrysler which they had for two or three days. Thereafter they nearly always had the use of a Buscemi car of which he did most of the driving [1193-4]. After the sale he never handed Buscemi an envelope containing money nor refund him any money for an interest in the Chevrolet [1211-12].

He accompanied Buscemi, Stroh and Guske after the former informed him, to the Uplands Police Department, where Buscemi and Stroh reported an accident involving said Chevrolet while driven by Stroh. He next saw the Chevrolet when it was delivered to him after Buscemi's written report of June 29, 1946 [Deft. Ex. "E"] and check for $483.85 for repairs [Ex. 70-B] as Buscemi was departing for Detroit, Michigan. Witness contributed no part of this repair expense and refunded no money to Buscemi on account thereof, nor did either defendant procure or pay for the Buscemi car and insurance policy [Deft. Ex. "D"] or pay any part of the premium and has done no business with the insurer for many years [1194-9].

In November, 1946, Buscemi had him attach a "For Sale" sign with the price thereon to the car and while parked on Figueroa Street in Los Angeles, Clarence E. Palm, a stranger, inquired about buying it. He demonstrated the car, Palm offered $1,425.00, and witness told him that the car belonged to Buscemi, to whose chicken house they went on 48th and Vermont. Witness told Buscemi that Palm offered $1,425.00 for the car and Buscemi said it is not enough, but agreed. Upon Palm's suggestion, they went across the street to the Bank of

America. Buscemi had the pink slip in his pocket and produced it. Mr. Tweedy in the bank prepared the bill of sale [Ex. 70-A] which Buscemi signed together with the pink slip, which Palm left at the bank to have transferred through the Vehicle Department to him. Palm delivered to Buscemi $1,425.00 in currency, including a $1,000.00 bill, which the latter placed in his pocket. None of this money was in witness's hands at any time [1199-1207].

They all left the bank and walked across the street together. Witness and Buscemi did not go around to the side or behind the bank. Witness already had promised to drive Palm, who was a stranger in Los Angeles, to his home in Inglewood. He drove him until Palm got his bearings and then returned via street car and has not since seen the Chevrolet [1207-10].

Buscemi never gave him any part of the proceeds of said sale of the Chevrolet [1209].

His testimony before Bankruptcy Referee Brink concerning his wife's sale and transfer of the Chevrolet to Buscemi and the latter's ownership thereof is true and the reporter's version of said testimony, rather than the indictment, is correct (Count III). He surrendered all property except exemptions to the bankruptcy receiver and his bankruptcy schedules are true [1212-17].

There was no cross-examination concerning the car.

Comment: The foregoing summarizes all pertinent evidence concerning the car referred to in Counts I, II and III. The testimony of perjurers, John and Lena Buscemi, is so contradictory and inherently incredible as to be

inadequate for a rational suspicion. But, as noted in Point III, and in the preceding analysis of their testimony, there is no basis for the assumption that the parties ever contemplated, much less effected, a resale of the car from Buscemi to Mrs. Noell or her husband. Conversely, the defendants are corroborated by distinterested witnesses and the official reports in every material aspect of their testimony. The question is not one of conflict but of *no evidence to support any count of the indictment concerning the car.*